92-94

No. 92-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

LARRY ZOBREST, SANDRA ZOBREST, husband and wife; JAMES ZOBREST, a minor, by LARRY and SANDRA ZOBREST, his parents,

Petitioners,

v.

CATALINA FOOTHILLS SCHOOL DISTRICT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner, James Zobrest, a boy profoundly-deaf from birth, has complied with the compulsory education laws of Arizona by attendance at the religious school of his parents' conscientious choice. Since he requires the services of a sign language interpreter in order to receive education, petitioner parents applied to respondent public school district for the providing of such services under the terms of the Education For the Handicapped Act (EHA)* for aid to the education of all children with disabilities. Respondent found James fully qualified under those terms to receive such services but declined, solely on Establishment Clause grounds, to furnish them on the premises of his school. The following question is presented:

> Does the Establishment Clause bar a public agency from providing sign language interpreter services under EHA to a deaf child on the premises of his religious school or from reimbursing his parents for the cost thereof?

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* 20 U.S.C. §1400, *et seq.* (and its state counterpart, Ariz. Rev. Stats. §§15-761, *et seq.*). The title of the federal act was changed in 1991 to Individuals With Disabilities Education Act ("IDEA") and, throughout the text, the terms "disabled," or "with disabilities" substituted for "handicapped." Since all documents in the record use the former "EHA" terminology, petitioners have retained that in their petition.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on May 1, 1992.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, which appears as Appendix A hereto, is reported at 1992 W.L. 86206 (9th Cir. (Ariz.)). The dissenting opinion in that court appears as Appendix B. The order and judgment of the United States District Court for the District of Arizona (441 EHLR 564 (D. Ariz. 1989), appealed from in the Court of Appeals, and which appears as Appendix C, is otherwise unreported.

JURISDICTION

This case was decided and judgment was entered by the United States Court of Appeals for the Ninth Circuit on May 1, 1992. The jurisdiction of this Court is invoked under Title 28 of the United States Code §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendment I:

> "Congress shall make no law respecting an establishment of religion . . ."

Education of the Handicapped Act:

> 20 United States Code, §§1400, 1401, 1412, 1413, 1414(a), 1415, reprinted in Appendix D hereto. (No changes relevant to this case appear in the Individuals With Disabilities Education Act amending EHA.)

Code of Federal Regulations:

> 34 C.F.R. §§76-651, 76-652 to 76-660; 300.1 to 300.14, 300.110 to 300.132, 300.304, 300.340 to 300.348, 300.401 to 300.403, 300.450 to 300.452, reprinted in Appendix E hereto.

Special Education For Exceptional Children Act:

> Arizona Revised Statutes, Art. 4, §§15-761, 15-764 to 15-769, reprinted in Appendix F hereto.

STATEMENT OF THE CASE

In October, 1987 petitioners Larry and Sandra Zobrest requested respondent public school district to provide the service of a certified sign language interpreter for their son, the petitioner James Zobrest, a profoundly deaf boy then 14 years old. Petitioners' application was made pursuant to the provisions of the Education of the Handicapped Act ("EHA"), 20 U.S.C. §1400, *et seq.*, and

its Arizona statutory counterpart, Ariz. Rev. Stats. §§15-761, *et seq.* Respondent, finding James to be a "handicapped person" within the meaning of EHA and Ariz. Rev. Stats. §15-761.7, and qualified under their terms to receive sign language interpreter services (R. 32,33),* issued on his behalf an Individualized Education Program ("IEP") as required by the EHA which specified: "All parties agree that Jim Zobrest needs the services of a sign language interpreter." See App. G. Petitioners then requested respondent to effectuate their IEP through channeling that service to James on the premises of the religious school they had chosen for his attendance, Salpointe Catholic High School.[1] Asserting solely Establishment Clause grounds, respondent declined. The Arizona Attorney General, concurring with respondent's decision, stated that it would be futile for petitioners to exhaust administrative remedies under EHA. (See App. H). (The parties subsequently so stipulated. R. 38-39.)

On August 1, 1988, petitioners brought this action in the United States District Court for the District of Arizona,[2] alleging economic hardship (R. 2, 27, 39) and claiming that respondent's denial of the requested services of a certified[3] sign language interpreter violated the EHA and petitioners' free exercise rights. The complaint sought an injunction requiring the providing of

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*The signal "R." refers to the Excerpts of Record in the Court of Appeals.

1. Salpointe is approved by the Department of Education, State of Arizona, and is accredited as a College Preparatory School by North Central Association of Colleges and Schools. R. 51.

2. District Court jurisdiction was invoked pursuant to 20 U.S.C. §1415(2)(4)(A), 28 U.S.C. §§2201, 2202 and Rule 65 of the Federal Rules of Civil Procedure.

3. A certified sign language interpreter is an individual certified by the national Registry of Interpreters For the Deaf and, as such, is bound by the Registry's Code of Ethics. Thereunder "[t]he interpreter's only function is to facilitate communication" without "becoming personally involved." Code of Ethics, 193. R.24-R.26.

the services and, alternatively, "such other and further relief as the Court may deem just and proper." (R. 6.)

The District Court on July 18, 1989, granted respondent's cross-motion for summary judgment and, relying upon *Aguilar v. Felton,* 473 U.S. 373 (1985) and *School District of Grand Rapids v. Ball,* 473 U.S. 373 (1985), held that the furnishing of the requested services to James would violate the Establishment Clause by creating "entanglement of church and state that is not allowed." *Zobrest v. Catalina Foothills School District,* 441 EHLR 564 (1989).

On August 4, 1989 respondents filed Notice of Appeal with the United States Court of Appeals for the Ninth Circuit. Briefing in that court was completed December 27, 1989. Two years and four months later, on May 1, 1992, a divided Court of Appeals affirmed the judgment of the District Court. On May 16, 1992, James was graduated from his high school.[4]

Petitioners, both under the prayer of their complaint for relief alternative to injunction and by virtue of 20 U.S.C. §1415(c)(2), now seek reimbursement of the expense they have incurred in paying for the services of a certified sign language interpreter for James for the school years 1988 through 1992. See *School Committee of the Town of Burlington, Massachusetts v. Department of Education,* 471 U.S. 358, 369 (1985); *Holt Civic Club v. Tuscaloosa,* 439 U.S. 60, 65-66 (1978); *Carter v. Florence County School District,* 950 F.2d 156 (4th Cir., 1991).[5]

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4. By order June 2, 1992, thirty-two days following its judgment of May 1, 1992, herein, the Court of Appeals *sua sponte* stayed its mandate until the Supreme Court "issues its opinion in *Lee v. Weisman,* No. 90-1014 and until further order of this court." See App. I.

5. During the four years of James' high school attendance, he has received, on public premises, two weekly 45-minute speech therapy sessions from respondent, with a continuing updating of his IEP in respect thereto.

The Court of Appeals' opinion identifies James Zobrest as "profoundly deaf, qualifying him as a handicapped child under the Federal Education of the Handicapped Act ('EHA'), 20 U.S.C. §1401(a)(1) and Ariz. Rev. Stats. §15-761(6); see also 34 CFR §300.5." App. A, A-4. Further, "[b]oth EHA and state funds are available to provide sign language interpreters. *See* 34 CFR §300.13. The parties do not dispute that James needs the assistance of a sign language interpreter in the classroom" (*ibid.*) and that that service "is one of the 'special education and related services' to which James is entitled." *Id.* at A-5, n. 1. The court likewise pointed out that, "if James attended either a public or a non-religious private school in Arizona, the Catalina Foothills School District . . . would assume full financial responsibility for the employment of a sign language interpreter for James." *Id.* at A-4, A-5.

Noting that James' parents "feel compelled by their religious convictions to enroll James in a Catholic high school" (*ibid.*), the court stated that that school "is a pervasively religious institution; religious themes permeate the classroom." *Ibid.* Further, "a sign language interpreter would be called up to translate religious precepts and beliefs during the course of James' education." *Ibid.*[6]

The Court of Appeals' affirmance centered upon a single ground: that to provide the services on the premises of James' religious school would have a primary effect advancing religion by creating a "symbolic union" of church and state. (App. A, A-10.) On petitioners' free exercise claim, the court held that "denial of aid to the Zobrests does impose a burden on their free exercise

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6. As well, according to the record, as the body of instruction in English, Social Science, Mathematics, Science, Foreign Languages and various electives. (R. 51: Salpointe Catholic High School Parent-Student Handbook, 10 (Academic Program).)

rights" but that the compelling state interest "in ensuring that the Establishment Clause is not violated" justifies imposition of that burden. App. A, A-14. The court dismissed the claim under the Equal Protection Clause raised by petitioners at the Court of Appeals level by stating that "the free Exercise clause does not provide a fundamental right for the Zobrests" and that James is not a member of a protected class whose treatment by the state is subject to strict scrutiny. App. A, A-15, n. 6.

The dissenting opinion of Tang, J., citing the Supreme Court's decisions in the *Witters, Mueller, Widmar, Allen* and *Everson* cases,[7] said that the majority had erred in its holding that "primary effect advancing religion" is determined by focusing on the specific use to which the interpreter would be put rather than on whether the EHA program as a whole (*i.e.*, embracing all handicapped children whether found in secular or religious settings) could be said to have the proscribed effect. App. B, A-19. The dissent further stated, on four grounds, that the majority and the district court misread and misapplied the Supreme Court's opinions in *School District of Grand Rapids v. Ball,* 473 U.S. 373 (1985), and *Meek v. Pittenger,* 421 U.S. 349 (1975). First, the legislation in those cases involved aid targeted to private (mostly religious) schools, whereas EHA's benefits, such as sign language interpretation, are diffused over the entire population to all handicapped children in whatever schools (though these will be mostly nonsectarian). "Handicapped children . . . not religious institutions, are the 'primary beneficiaries' of the EHA's and Arizona law's benefits." *Id.* at A-21, A-22.

Second, the dissent noted that the provision of a sign language interpreter, unlike the public assistance provided in *Grand Rapids* and *Meek,* "would not result in

7. *Witters v. Washington Dept. of Services for the Blind,* 471 U.S. 481 (1986), *Mueller v. Allen,* 463 U.S. 388 (1983), *Widmar v. Vincent,* 454 U.S. 263 (1981), *Board of Education v. Allen,* 396 U.S. 236 (1968), *Everson v. Board of Education,* 330 U.S. 1 (1947).

state funds directly or even indirectly flowing to Salpointe [James' school]." And "[t]he provision of an interpreter . . . would not relieve Salpointe of any preexisting financial or educational obligation." *Id.* at A-23.

Third, while in *Grand Rapids* and *Meek,* government "affirmatively directed educational assistance to religious institutions," if James' school would benefit at all from the EHA program, it would do so "only as a consequence of independent decisionmaking by the Zobrests." *Ibid.*

Fourth, the dissenting opinion found, in the "narrow, isolated and unique" role of the interpreter, "no symbolic union of church and state [which] inures in the simple act of paying the salary of a sign language interpreter." The "mechanical service [of the interpreter], changing words from one language to another" is that of a "technical facilitator," like eyeglasses or a hearing aid. *Id.* at A-25, A-26. The dissent, taking note of *Board of Education Westside Community Schools v. Mergens,* 469 U.S. 226 (1990), found no impermissible union of church and state in the fact that the interpreter would "be used to convey sectarian as well as secular ideas" (*id.* at A-24) or, (citing *Wolman v. Walter,* 433 U.S. 229, 241-244 (1977)), that he/she would be so used on the premises of a religious school. *Id.* at A-25.

While the majority had not reached respondent's "excessive entanglements" claim, the District Court had upheld that claim. The dissent held to the contrary, stating that respondent's supervision of the interpreter does not rise to the level of excessive entanglement; that the interpreter's services are "distinctly more cabined than those of a teacher or therapist," the interpreter being "just a conduit." *Id.* at A-31.

As to petitioners' free exercise claim, the dissent held that no compelling interest justified the state's

withholding the benefits sought by them. *Id.* at A-33.[8]

REASONS FOR GRANTING THE WRIT

I. The Ninth Circuit's Decision Significantly Misconceives *Lemon v. Kurtzman* And Is An Unwarranted Expansion Of This Court's Holding In *Grand Rapids School District v. Ball*

1. The Court of Appeals interpretation of *Lemon* places it squarely in conflict with the holdings of the Supreme Court in *Mueller, supra, Witters, supra* and *Bowen v. Kendrick,* 487 U.S. 589 (1988). In *Mueller* and *Witters* this Court rejected the contention that neutrally provided governmental assistance to a broad spectrum of individuals, some of whom will make private choices to use the assistance for education at a religious school, automatically has a primary effect advancing religion. And see *Lee v. Weisman,* 60 U.S.L.W. 4723, 4736 (U.S. June 23, 1992) (Souter, J., concurring). In *Kendrick* the

8. The dissent (App. B, fn. 2) noted that neither the parties nor the majority had addressed 34 C.F.R. §76.532 (1984) pertaining to all state-administered federal grant programs and prohibiting the use of grant funds for religious "worship, instruction, or proselytization." §76.532 can only be read as an apparent device to utilize the regulations to express a constitutional viewpoint. It is nongermane to EHA, has nothing to do with aid to the educational needs of children with disabilities, and is at war with EHA's objective to help "all" children with disabilities. A ruling by this Court on the Establishment Clause issue herein should be dispositive of the prohibition of §76.532. And see *Bowen, supra,* at 624-625 (Kennedy, J., concurring). Subsequent to adoption of §76.532, William J. Bennett, as Secretary of Education, on September 12, 1985, by a letter to each Chief State School Officer respecting EHA services, stated that *Aguilar v. Felton, supra,* "need not have the effect of prohibiting on-premises services to private school children in all other Federal programs." *Teague,* EHLR 211:372 (1985). This position has since been confirmed by the Department. See *Davila,* 17 EHLR 1120 (OSEP, 1991). The application of §76.532 herein would unconstitutionally penalize petitioner for his exercise of religious choice in education. See discussion *infra,* 9-10.

Court found no primary effect advancing religion in the bare fact that religious institutions receive government grants.

2. The Ninth Circuit's interpretation of the *Lemon* "primary effect advancing religion" test accentuates the need for this Court to impose logical limitations on the terms "primary" and "advancing." The Ninth Circuit's opinion holds that test to mean that the *primary* effect of the state's affording a deaf person the EHA "related service" of a sign language interpreter on the premises of the religious school he lawfully attends is necessarily to *advance* his religion rather than the acquisition of the body of secular knowledge imparted in a modern American high school. The ruling below fails to recognize that the furnishing of an EHA "related service" on a religious site may have *multiple* effects, accommodating the student's religion being but one. If the court below is correct in its reliance on the "primary effect" test of *Meek v. Pittenger,* 421 U.S. 349 (1975), *Meek* should be reexamined lest application of the primary effect test to *on site* public aid to children in religious schools be held to contradict the logic of this Court's statement, that *Meek* presented

> . . . no question 'whether the Constitution permits the states to give special assistance to some of its children whose handicaps prevent their deriving the benefit normally anticipated from the education required to become a productive member of society and, at the same time, to deny those benefits to other children *only because* they attend a Lutheran, Catholic, or other church sponsored school . . .'

Meek, supra, at 368, n. 17 (emphasis by Court).

3. The Court of Appeals' conception of "primary effect" ignores the fact that the "advancing" of religion is but one of two effects which the Supreme Court has held to fail the strictures of the Establishment Clause. Governmental action whose primary effect is to *inhibit* religion also breaches the Establishment Clause. *School*

District of Abington Township v. Schempp, 374 U.S. 203, 222 (1963). The Court in *Schempp* cited *Everson v. Board of Education,* 330 U.S. 1 (1947) wherein it had held that "other language of the Constitution" forbids the excluding of individuals, *"because of their faith or lack of it,* from receiving the benefits of public welfare legislation." *Id.* at 16. (Emphasis by the Court.) The present case parallels *Everson.* In each, a public welfare benefit is offered a broad class of children; in each, that benefit is to be realized on religious school premises; in each, it is asked that "tax-raised funds . . . be paid to reimburse individuals on account of money spent by them in a way that furthers a public program" (*Everson, supra,* at 6); in each the denial of the benefit (or reimbursement) would plainly penalize (inhibit) religiously grounded conduct. This is especially noteworthy here since, as the court below noted (App. A., A-4, A-5), the school district would provide James an interpreter at a public school *or at a secular private school but not at his religious private school* — plainly a "governmental classification based on religion." *Employment Division v. Smith,* 494 U.S. 872, 886, n. 9 (1990).

The decision below, thus needlessly forcing a conflict between Establishment and Free Exercise principles,[9] gives rise to the need for its review.

4. The court below, relying on *Grand Rapids School District v. Ball, supra,* held that the primary effect of furnishing the service sought by petitioners would be the creating of a "symbolic union of government and religion." But in *Grand Rapids* the Supreme Court narrowly grounded its "symbolic union" teaching on

9. Petitioners have not here raised Free Exercise issues since the Establishment Clause issue is dispositive of this case. The Court of Appeals holds that a compelling state interest (*i.e.,* "ensuring that the Establishment Clause is not violated") justifies imposing a burden on petitioners' acknowledged Free Exercise rights. Thus the court at once employs the Establishment Clause to invade Free Exercise territory and to contradict the teaching of *Smith* respecting the "compelling state interest" test. See, *Smith,* supra, 883-884.

realistic considerations respecting whether particular governmental action would "convey a message" of governmental endorsement of religion. *Id.* at 389-390. The Ninth Circuit has now expanded that teaching into a rule which necessarily invalidates all governmental programs of assistance to children at religious sites where they have been placed by their parents for schooling, child care or other purposes. Such a rule is at radical variance with the teaching of *Westside Community Schools v. Mergens,* 469 U.S. 226, 249-250 (1990), which sees "crucial symbolic links" in terms of practical likelihood — *e.g.,* in the instant and like cases, whether the presence and functioning of a state employee (indeed here a non-teacher) who performs EHA "related services" on religious school premises will likely appear to an aided student's peers (or to the public) as government endorsement of a religion. The Ninth Circuit now extends the "symbolic union" doctrine to apply to situations where no such likelihood exists, the nature of the premises alone rendering the service unconstitutional.

II. The Decision Below Renders A Federal Statute For Aid To The Education Of All Handicapped Children Unavailable To Many Of Its Intended Beneficiaries

1. This case presents a question of major importance to children with disabilities and their parents.[10] The

10. The Court has not previously ruled on the question here presented. *Goodall v. Stafford County School Board,* 930 F.2d 363 (4th Cir. 1991), cert. denied, 60 U.S.L.W. 3251 (U.S. Oct. 7, 1991) involved a suit by parents to require a public school board to provide, under EHA and Virginia law, cued speech interpreter services to their deaf child on religious school premises. The complaint asserted Free Exercise and Establishment Clause grounds. The Fourth Circuit affirmed a district court ruling denying the services, first, on the independent ground of Virginia law, then, additionally, on statutory and Establishment Clause grounds. In their petition for certioriari the parents presented nine questions and subquestions under both Virginia law, the terms of EHA, and the federal Free Exercise and Establishment Clauses.

federal-state program created by EHA has as its express purpose to assure that "all" handicapped children have available to them special education and related services. 20 U.S.C. §1400. The Act requires the inclusion of private (including religious) school children. 20 U.S.C. §1413(a)(4)(A); 34 C.F.R. §§300.341(b), 300.347, 300.348, 300.401-300.480 and 34 C.F.R. §§76:651-76:663. The decision of the Court of Appeals herein would, by necessary implication, frustrate the affording of the intended benefits of EHA to disabled children who need to receive them at the religious schools chosen by their parents (and wherein they meet the educational requirements of law). For them the Act is rendered inoperative. The decision below "deprives them of a program that offers a meaningful chance at success in life." *Aguilar, supra,* at 431 (O'Connor, J., dissenting).

2. Especially because of the national statute involved in this case, with complementary statutes having been enacted by states, the issue here presented is significant and likely to recur. See *Simon & Schuster v. Crime Victims Board,* 60 U.S.L.W. 4029, 4032 (U.S. Dec. 10, 1991).[11]

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11. The case has already been the subject of national comment. See S. Huefner, *The Establishment Clause as Antiremedy,* Phi Delta Kappan, Sept. 1991, 72; J.R. McKinney, *Special Education and the Establishment Clause,* 65 Education Law Rep. 1 (1991); J.J. Kilpatrick, *Church and State: The Supreme Court Must Try Again to Clarify the Establishment Clause,* The Post and Courier, Charleston, SC, June 3, 1992 (11A).

CONCLUSION

For all of the foregoing reasons, petitioners respectfully urge that this petition be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

LARRY ZOBREST; SANDRA ZOBREST, husband and wife; JAMES ZOBREST, a minor, by LARRY and SANDRA ZOBREST, his parents,

Plaintiffs-Appellants,

v.

CATALINA FOOTHILLS SCHOOL DISTRICT,

Defendant-Appellee.

No. 89-16035

D.C. No. CV-88-0516-RMB

OPINION

Appeal from the United States District Court
for the District of Arizona
Richard M. Bilby, District Judge, Presiding

Argued and Submitted
December 12, 1990—Pasadena, California

Filed May 1, 1992

Before: Thomas Tang, Betty B. Fletcher, and Stephen Reinhardt, Circuit Judges.

Opinion by Judge Fletcher; Dissent by Judge Tang

SUMMARY

Individual Rights/Constitutional Rights/Handicapped

Affirming a district court grant of summary judgment in favor of a school district, the court of appeals held that neither

the Establishment Clause nor the Free Exercise Clause was violated by the school district's failure to provide a state-paid sign language interpreter to a handicapped student while he attended a sectarian school.

Appellants Larry and Sandra Zobrest, parents of a handicapped student attending a Catholic school, brought an action against the Catalina Foothills School District under the Federal Education of the Handicapped Act and a counterpart Arizona statute requiring that handicapped students be provided with the services necessary to meet their educational needs. Both EHA and state funds are available to provide sign language interpreters to handicapped students enrolled in public schools. The Zobrests felt compelled to enroll their son in a Catholic high school because of their religious convictions. However, the school district, after obtaining an opinion from the Arizona Attorney General that furnishing an interpreter would violate the Establishment Clause, declined to provide one. The district court granted summary judgment for the school district, denying the Zobrests' motion for injunctive relief. The court ruled that providing such an interpreter to the student in this case would violate the first amendment.

[1] The statutes at issue in this case had a secular purpose of providing the state's handicapped children with assistance in enjoying a full and equal education. **[2]** Although the court found that the EHA and the corresponding Arizona statutes passed the first part of the *Lemon* case in that they had a secular purpose, their proposed application could not survive the second part of that test. **[3]** The court noted that an interpreter would be at the student's side in each of his classes at a sectarian school, including religion classes, and the government would create the appearance that it was a "joint sponsor" of the school's activities. **[4]** Supreme Court cases involving attenuated financial benefits neutrally available to parochial schools from the controlled choices of indivuduals were unavailing to the Zobrests, **[5]** as were those that have upheld aid to sectarian schools where the purely secular content of

the goods and services provided was easily ascertainable. **[6]** Here, the interpreter would have acted in a school environment in which the two functions of secular education and advancement of religious values or beliefs were inextricably intertwined. **[7]** Thus, if applied as proposed, the primary effect of the statutes in question was not one that either advanced or inhibited religion.

[8] The court also held that the aid the Zobrests sought did not infringe on their rights under the Free Exercise Clause. **[9]** Although denial of the requested interpreter imposed a burden on their free exercise rights, **[10]** a compelling state intererest justified the imposition of the burden.

In a strong dissent, Judge Tang believed that providing such an interpreter in a Catholic school would not violate the first amendment's prohibition against the establishment of religion. Any indirect benefit enjoyed by the sectarian school would be attributable solely to the Zobrests' independent decision to apply available state aid to their son's education in a sectarian school, and not to any state action sponsoring or subsidizing religion.

COUNSEL

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John C. Richardson, DeConcini, McDonald, Brammer, Yetwin & Lacy, Tucson, Arizona, for the defendant-appellee.

OPINION

FLETCHER, Circuit Judge:

The Zobrests appeal the district court's ruling that provision of a state-paid sign language interpreter to James Zobrest while he attends a sectarian high school would violate the Establishment Clause. The Zobrests also argue that denial of such assistance violates the Free Exercise Clause.

We affirm.

BACKGROUND

James Zobrest is a student at Salpointe Catholic High School. He is profoundly deaf, qualifying him as a handicapped child under the Federal Education of the Handicapped Act ("EHA"), 20 U.S.C. § 1401(a)(1), and Ariz. Rev. Stat. § 15-761(6); *see also* 34 C.F.R. § 300.5. The EHA provides federal funds to state and local governments for the purpose of educating handicapped children. *Board of Educ. v. Rowley*, 458 U.S. 176, 179 (1982). In order to obtain federal funds, a state must offer all handicapped children within its jurisdiction a "free appropriate public education." 20 U.S.C. § 1412(1). Under the program, states and school districts provide handicapped students the services necessary to meet their special educational needs. 20 U.S.C. § 1413(a)(4)(A). Arizona has enacted a statutory scheme designed to meet the educational needs of its handicapped students and to qualify it for federal assistance under the EHA. Ariz. Rev. Stat. §§ 15-761 to 15-772.

Both EHA and state funds are available to provide sign language interpreters. *See* 34 C.F.R. § 300.13. The parties do not dispute that James needs the assistance of a sign language interpreter in the classroom. The parties have also agreed that, if James attended either a public or a non-religious private school in Arizona, the Catalina Foothills School District

("School District") would assume full financial responsibility for the employment of a sign language interpreter for James.[1]

Salpointe High is a private Roman Catholic school, operated by the Carmelite Order of the Catholic Church. Salpointe is a pervasively religious institution; religious themes permeate the classroom. According to the parties' stipulation of facts, "[t]he two functions of secular education and advancement of religious values or beliefs are inextricably intertwined throughout the operations of Salpointe." Salpointe "encourages its faculty to assist students in experiencing how the presence of God is manifest in nature, human history, in the struggles for economic and political justice, and other secular areas of the curriculum." Religion is a required subject for students enrolled at Salpointe, and the students are strongly encouraged to attend the Mass celebrated there each morning. As a result, a sign language interpreter would be called upon to translate religious precepts and beliefs during the course of James's education.

Sandra and Larry Zobrest, James's parents, feel compelled by their religious convictions to enroll James in a Catholic high school.

Prior to their son's enrollment at Salpointe, the Zobrests requested that the School District supply James with a certi-

[1]The bulk of EHA benefits are targeted for students enrolled in public schools or placed in private schools by state or local officials. *See* 20 U.S.C. § 1413(a)(4)(B). When parents voluntarily enroll their handicapped children in private school, the state need not pay those children's tuition. 34 C.F.R. § 300.403(a). The state and local school district, however, still must provide "special education and related services" to the private school children. 34 C.F.R. § 300.452(a). For purposes of this litigation, the parties do not dispute that sign language interpretation is one of the "special education and related services" to which James is entitled. The parties agree that, if James's parents enrolled him in a non-sectarian private school or public school, the School District would be obliged to provide a sign language interpreter for him.

fied sign language interpreter for his classes at Salpointe, beginning in August 1988. The School District petitioned the Pima County Attorney for an opinion on the constitutionality of providing such a service. The Deputy County Attorney subsequently advised that furnishing an interpreter would offend both state and federal constitutional prohibitions against a state establishment of religion. *See* U.S. Const. amends. I, XIV; Ariz. Const. art. 2, § 12. In June 1988, the Arizona Attorney General concurred in the Deputy County Attorney's opinion.[2]

In August 1988, the Zobrests initiated a civil action under the EHA, 20 U.S.C. § 1415(e), seeking an injunction requiring the School District to provide James with an interpreter. Pending the outcome of this litigation, the Zobrests have employed an interpreter for their son at their own expense. On August 15, 1988, the district court denied the Zobrests' request for a preliminary injunction. The court found that the Zobrests had not demonstrated a likelihood of success on the merits, because the provision of an interpreter would likely offend the first amendment's establishment clause.

On July 20, 1989, the district court granted the School District's motion for summary judgment, holding that the furnishing of a sign language interpreter would in fact offend the first amendment. The court noted that:

> The interpreter would act as a conduit for the religious inculcation of James — thereby promoting James's religious development at government expense. That kind of entanglement of church and State is not allowed.

[2]The parties agreed that, in light of the Deputy County Attorney's and Attorney General's decisions, exhaustion of the EHA's administrative review procedure, 34 C.F.R. §§ 300.506 to 300.510, would be futile. Exhaustion of the EHA's administrative procedures is not required when it is futile. *Honig v. Doe*, 484 U.S. 305, 327 (1988); *see also Wilson v. Marana Unified School Dist.*, 735 F.2d 1178, 1181 (9th Cir. 1984).

Zobrest v. Catalina Foothills School District, No. CIV-88-516 (D.Ariz. Oct. 19, 1989) (order granting summary judgment). The court did not pass on the question of whether the employment of a sign language interpreter would also violate the Arizona Constitution. The Zobrests appeal this order.

STANDARD OF REVIEW

We review the district court's grant of summary judgment de novo. *Kruso v. International Tel. & Tel. Corp.*, 872 F.2d 1416, 1421 (9th Cir. 1989), *cert. denied*, 110 S.Ct. 3217 (1990). We must determine, viewing the evidence in the light most favorable to the nonmoving party, whether genuine issues of material fact exist and whether the district court correctly applied the law. *Tzung v. State Farm Fire and Casualty Co.*, 873 F.2d 1338, 1339-40 (9th Cir. 1989).

Whether the provision of a state-financed sign language interpreter to a student enrolled in a private sectarian school violates the establishment clause is a question of constitutional law that we review de novo. *See Carreras v. City of Anaheim*, 768 F.2d 1039, 1042 n.2 (9th Cir. 1985). We likewise review de novo the constitutionality of the school district's decision to withhold aid from the Zobrests. *Id.*

DISCUSSION

I. The Establishment Clause

The first amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. Const. amend. I. This prohibition extends to the states through the fourteenth amendment. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

A. The *Lemon v. Kurtzman* Test

To "guide" the Establishment Clause inquiry, the Supreme Court has fashioned a three-part test. *Mueller v. Allen*, 463

U.S. 388, 394 (1983). In general terms, a statute will be upheld if: the statute has a "secular legislative purpose"; the statute's "principal or primary effect [is] one that neither advances or inhibits religion"; and, the statute does not "foster an excessive government entanglement with religion." *Id.* (citing *Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971)).

B. Secular Legislative Purpose

[1] The Supreme Court has noted its "reluctance to attribute unconstitutional motives" to a statute's drafters, "particularly when a plausible secular purpose for the [program] may be discerned from the face of the statute." *Mueller v. Allen*, 463 U.S. at 394-95. The statutes at issue here evince a secular purpose.

In enacting the EHA, Congress made clear its secular purpose:

> It is the purpose of this Chapter to assure that all handicapped children have available to them . . . a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of handicapped children and their parents or guardians are protected, to assist States and Localities to provide for the education of all handicapped children, and to assess and assure the effectiveness of efforts to educate handicapped children.

20 U.S.C. § 1400(c).

The Arizona counterpart to the EHA reveals a similar goal of providing the state's handicapped children with the assistance they might need to enjoy full and equal educational opportunities.

[2] Thus, the EHA and the corresponding Arizona statutes pass the first part of the *Lemon* test. However, we find their proposed application cannot survive the second part of that test.[3]

C. Statutes' Primary Effect

In *Grand Rapids School District v. Ball*, 473 U.S. 373 (1985), the Supreme Court held that programs under which public school employees provided classes in private schools violated the Establishment Clause, where all but one of the private schools involved were sectarian in nature. The Court found that the programs "may impermissibly advance religion in three ways." *Grand Rapids*, 473 U.S. at 385. One of the impermissible effects the Court cited was that "the programs may provide a crucial symbolic link between government and religion, thereby enlisting—at least in the eyes of impressionable youngsters—the powers of government to the support of the religious denomination operating the school." *Id.* The

[3]The Supreme Court has generally considered the validity of a challenged statute "on its face." *Bowen v. Kendrick*, 487 U.S. 589, 600 (1988). However, "[t]here is . . . precedent for distinguishing between the validity of a statute on its face and its validity in particular applications." *Id.*, 487 U.S. at 602. For example, in *Hunt v. McNair*, 413 U.S. 734 (1973), the Supreme Court ruled on the validity of South Carolina's aid under a revenue bond act to an individual college, rather than on the constitutionality of the act as a whole. The court stated: "To identify 'primary effect,' we narrow our focus from the statute as a whole to the only transaction presently before us." *Hunt*, 413 U.S. at 742. In *Bowen*, while the court found the challenged statute to be facially valid, it directed the district court to "consider on remand whether particular ALFA grants have had the primary effect of advancing religion." *Bowen*, 487 U.S. at 622. In this case, we consider only the validity of one very specific proposed application of the statutes at issue. Consideration of the statutes "as applied" seems particularly appropriate because their descriptions of the aid to be provided are extremely broad. *See* 20 U.S.C. § 1413(a)(4)(A) (requiring states to establish policies and procedures to ensure "by providing for such children special education and related services" that children with disabilities participate in aid programs); Ariz. Rev. Stat. § 15-764 (requiring educational authorities to "provide special education and related services for all handicapped children").

Court noted, "Government promotes religion as effectively when it fosters a close identification of its powers and responsibilities with those of any—or all—religious denominations as when it attempts to inculcate specific religious doctrines." *Id.*, 473 U.S. at 389. The Court cited a lower court opinion, which stated that, "Under the City's plan public school teachers are, so far as appearance is concerned, a regular adjunct of the religious school . . . . The religious school appears to the public as a joint enterprise staffed with some teachers paid by its religious sponsor and others by the public." *Id.*, 473 U.S. at 392 (quoting *Felton v. Secretary, United States Dept. of Ed.*, 739 F.2d 48, 67-68 (1984)). The Supreme Court concluded that "the symbolic union of government and religion in one sectarian enterprise . . . is an impermissible effect under the Establishment Clause. " *Grand Rapids*, 473 U.S. at 392; *see also Goodall by Goodall v. Stafford County Sch. Bd.*, 930 F.2d 363, 370-72 (4th Cir.) (provision of sign language interpreter to sectarian school student under EHA and Virginia implementing regulations would violate Establishment Clause), *cert. denied*, 112 U.S. 188 (1991).

[3] Were we to sanction the aid the Zobrests seek, a public employee would be at James Zobrest's side in each of his classes at a sectarian school. With James, the employee would attend religion classes, the nominally "secular" subjects, in which as the parties stipulate, Salpointe faculty are encouraged to "assist students in experiencing how the presence of God is manifest," and the masses at which Salpointe encourages attendance. The interpreter would be the instrumentality conveying the religious message and experience. This presence and function of an employee paid by the government in sectarian classes would create the "symbolic union" *Grand Rapids* found impermissible. By placing its employee in the sectarian school to perform this function, the government would create the appearance that it was a "joint sponsor" of the school's activities.[4]

[4]One might attempt to distinguish *Grand Rapids* on the grounds that all but one of the courses at issue in that case were taught in elementary school, while the Zobrests seek aid for their son while he attends a Catholic high school. However, while the Supreme Court in *Grand Rapids* expressed special concern for "children of tender years," 473 U.S. at 390, it did not limit its holding to elementary schools. Further, the Zobrests "feel it particularly essential that, at the time of adolescence, James be enrolled in a religious school." They thus implicitly acknowledge the vulnerability of young people of James' age.

Two lines of cases the Zobrests cite in support of their appeal are distinguishable from the case at hand. First, this case does not involve "the sort of attenuated financial benefit, ultimately controlled by the private choices of individual parents, that eventually flows to parochial schools from [a] neutrally available . . . benefit . . . ." *Mueller v. Allen*, 463 U.S. at 400. In *Mueller v. Allen*, the Supreme Court upheld a Minnesota program under which all parents were entitled to tax deduction for the cost of their children's "tuition, textbooks and transportation." The Court noted that, "by channeling whatever assistance it may provide to parochial schools through individual parents, Minnesota has reduced the Establishment Clause objections to which its action is subject. *Id.*, 463 U.S. at 388. Similarly, in *Witters v. Wash. Dept. of Servs. for the Blind*, 474 U.S.481 (1986), the Court held that the award of special education assistance to a visually handicapped student who sought to use that assistance at a sectarian college did not violate the Establishment Clause. Again, the Court emphasized the private individual's decision in directing state provided aid: "In this case, the fact that aid goes to individuals means that the decision to support religious education is made by the individual, not by the State." *Witters*, 474 U.S. at 488.

[4] Were we to grant the Zobrests the relief they request, public aid would not be channeled to the sectarian school through the decision of an individual. Instead, the government would be required to place its own employee in the sectarian school. On the facts before us, these cases are unavailing.

[5] Nor can the Zobrests rely on cases in which the Supreme Court has upheld the provision to sectarian schools of aid where the "*purely secular* content of the goods and services provided" was "easily ascertainable." *Goodall*, 930 F.2d at 371 (emphasis original). "It is, of course, true that as part of general legislation made available to all students, a State may include church-related schools in programs providing bus transportation, school lunches, and public health facilities—secular and nonideological services unrelated to the primary, religion-oriented educational function of the sectarian school." *Meek v. Pittinger*, 421 U.S. 349, 364 (1975); *see also Lemon v. Kurtzman*, 403 U.S. at 616 ("Our decisions . . . have permitted the States to provide church-related schools with secular, neutral, or nonideological services, facilities or materials."). In approving such aid to sectarian schools, the Supreme Court has been careful to emphasize the secular nature of this aid. For example, in *Board of Educ. v. Allen*, 392 U.S. 236 (1968), the Court upheld the provision of secular subject textbooks to all schools, including sectarian schools, in New York. The Court observed, "Although the books loaned are those required by the parochial school for use in specific courses, each book loaned must be approved by the public school authorities; only secular books may receive approval." *Allen*, 392 U.S. at 244. In *Wolman v. Walter*, 433 U.S. 229 (1977), the Supreme Court upheld funding for the provision to sectarian schools of secular textbooks, standardized tests and scoring services, speech and hearing diagnostic services and off-site therapeutic and remedial services. In discussing each of these categories, the Court emphasized the secular nature of the aid provided and the capacity for its complete separation from any entanglement; for example, with regard to standardized tests, the Court noted: "The nonpublic school does not control the content of the test or its result. This serves to prevent the use of the test as a part of religious teaching . . . ." *Wolman*, 433 U.S. at 240. However, in *Wolman* the Court did not permit funding for the purchase of instructional materials for loan to parents or for

field trip services; with regard to the latter category, the Court stated, "The field trips are an integral part of the educational experience, and where the teacher works within and for a sectarian institution, an unacceptable risk of fostering of religion is an inevitable by-product" *Id.*, 433 U.S. at 254.

[6] Here, as the parties stipulate, the interpreter would be required to act in a school environment in which "the two functions of secular education and advancement of religious values or beliefs are inextricably intertwined." Unlike the aid approved in *Allen* and *Wolman*, then, the assistance the state would provide in this case cannot be said to be of a clearly secular and separable nature.[5]

[7] Thus, if applied as the Zobrests propose, the statutes at issue fail to survive the second part of the *Lemon* test. We therefore find that state provision of the aid the Zobrests seek would violate the Establishment Clause.

II. Free Exercise Clause

[8] We turn now to the second issue the Zobrests raise:

[5]It could be argued that we might uphold the statutes insofar as they permit James Zobrest to receive the services of a state-paid interpreter during "secular" subjects, prohibiting only the presence of the interpreter during religion classes and mass. While we do not find it otherwise necessary to discuss the third part of the *Lemon* test, we do note that such a solution would place this case within the "Catch 22" in which "the very supervision of the aid to assure that it does not further religion renders the statute invalid." *Bowen v. Kendrick*, 487 U.S. 589, 615 (1988). Were we to uphold aid to the Zobrests under these conditions, the government would be required to monitor closely the interpreter's activities to ensure that assistance was not provided at prohibited times. Moreover, as religious instruction at Salpointe is not limited to specific classes, but pervades the entire curriculum, this monitoring would be the kind of "comprehensive, discriminating and continuing state surveillance," *Lemon*, 403 U.S. at 619, the Establishment Clause condemns. *See Meek v. Pittinger*, 421 U.S. at 369-72 (discussing entanglement problems created by need to ensure that "teachers play a strictly nonideological role").

does denial of the assistance of a sign language interpreter unconstitutionally infringe on their rights under the Free Exercise Clause? We find that it does not.

The government places a burden on an individual's free exercise rights when it forces the individual to choose between adhering to her religion, thus forgoing state provided benefits, and abandoning a religious precept in order to receive those benefits. *Sherbert v. Verner*, 374 U.S. 398, 404 (1963). The imposition of such a burden violates the Free Exercise Clause unless it is justified by some compelling state interest. *Id.*, 374 U.S. at 406. Thus, in *Sherbert v. Verner*, the Supreme Court held that South Carolina could not deny unemployment compensation to a member of the Seventh Day Adventist church because she refused to accept any job which required her to work on Saturday, her faith's Sabbath. *Id.*, 374 U.S. at 404. South Carolina sought to justify its restriction on benefits as a means of combatting fraud; however, the Supreme Court rejected this argument, noting that there was no evidence of fraud, nor had the state demonstrated that it could not accomplish its goal by some less restrictive means. *Id.*, 374 U.S. at 407.

[9] Here, denial of aid to the Zobrests does impose a burden on their free exercise rights. They will have either to forgo a sectarian education for James in order to receive the assistance of a sign language interpreter for him at school, or they will have to pay the cost of the interpreter's services themselves, while keeping him at Salpointe.

[10] However, a compelling state interest justifies the imposition of this burden. The government has a compelling interest in ensuring that the Establishment Clause is not violated. *Goodall*, 930 F.2d at 370; *see also Doe v. Village of Crestwood, Ill.*, 917 F.2d 1476 (7th Cir. 1990) (affirming grant of injunction against mass during public festival held in public park; government cannot convey the message that it is endorsing religion), *cert. denied*, 111 S.Ct. 754 (1991). It is

difficult to imagine a more compelling interest than avoiding a violation of the Constitution. Likewise, here, there is no "less restrictive means" by which the state may accomplish that goal.

Thus, the refusal to provide James Zobrest with a state paid sign language interpreter while he attends a sectarian high school does not violate the Free Exercise clause.[6]

The judgment of the district court is AFFIRMED.

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[6]The Zobrests also argue that denying James Zobrest the assistance of a sign language interpreter would violate the Equal Protection Clause. As our analysis above makes clear, in this context the Free Exercise clause does not provide a fundamental right for the Zobrests: they have no entitlement to state support for James' religious education in the form they seek. Nor can the Zobrests show that the state's treatment of James Zobrest is subject to strict scrutiny because he is a member of a protected class. The state's refusal to send a state-paid interpreter into a religious school is rationally related to its goal of avoiding a violation of the First Amendment. Thus, the Zobrests' Equal Protection argument must fail.

APPENDIX B

Dissenting Opinion of the United States Court of Appeals for the Ninth Circuit

TANG, Circuit Judge, Dissenting:

"Justice," Judge Learned Hand once observed, "is the tolerable accommodation of the conflicting interests of society." Few cases more aptly demonstrate the truth of Judge Hand's words than the appeal before us now. For the efforts of the Zobrest family to educate their deaf son in a manner compelled by their religious faith require us to engineer a delicate constitutional balance between the competing goals of freedom of religion, separation of church and state, and equal educational opportunities for the handicapped. The Zobrests have presented us with a ponderous constitutional conundrum, made worse by the opacity of First Amendment jurisprudence. Given the competing values at stake, I cannot fault the majority's resolution of this case. I can state only that I dis-

agree. I believe that the state's provision of a sign language interpreter to James Zobrest for his studies in a Catholic high school would not transgress the First Amendment's prohibition against the establishment of religion. I would therefore reverse the judgment of the district court.

DISCUSSION

I. *The Establishment Clause*

State action impacting religion will survive an Establishment Clause challenge if the action (1) has a secular legislative purpose; (2) has a principal or primary effect that neither advances nor inhibits religion; and (3) does not excessively entangle government with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

A. *Secular Legislative Purpose*

I agree with the majority's conclusion that the federal Education of the Handicapped Act ("EHA"), 20 U.S.C. § 1401(a)(1), and its Arizona counterpart, Ariz. Rev. Stat. § 15-761(6), pass the first leg of the *Lemon* test because they have secular legislative purposes. That the aid provided under the program would on this occasion benefit religion or religious exercise does not preclude a finding of secular purpose. In *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481, 485-86 (1986), the Supreme Court held that educational assistance provided by the state to visually handicapped students served a valid secular purpose, despite its application in that particular instance to a religious institution. Washington's effort "to promote the well-being of the visually handicapped through the provision of vocational rehabilitation services" constituted a legitimate governmental interest and goal. *Id.* The fact that some small portion of the state's funds ultimately flowed to a religious institution did not undercut the laudatory secular purpose of the law. *Id.* at 486.

Similarly, in *Mueller v. Allen*, 463 U.S. 388 (1983), the Supreme Court held that a state's decision to defray by means of a tax deduction educational expenses incurred by parents "evidences a purpose that is both secular and understandable." *Id.* at 395. The Court reasoned that:

> An educated populace is essential to the political and economic health of any community, and a State's efforts to assist parents in meeting the rising cost of educational expenses plainly serves this secular purpose of ensuring that the State's citizenry is well-educated.

Id.; *see also Hunt v. McNair*, 413 U.S. 734, 741 (1973) (the issuance of revenue bonds to assist all colleges in constructing and financing projects has a valid secular purpose because the legislature intended to provide its youth " 'the fullest opportunity to learn and to develop their intellectual and mental capacities' ") (quoting S.C. Code Ann. § 22.41 (Supp. 1971)).

Because government has a valid secular interest in cultivating the talents and skills of handicapped children and in removing barriers to the achievement of their full academic potential, I agree that neither the EHA nor its companion Arizona law has as its purpose the endorsement or promotion of religion.

B. *Primary Effect*

State actions run afoul of the second branch of the *Lemon* test if they "result[ ] in the direct and substantial advancement of religious activity." *Meek v. Pittenger*, 421 U.S. 349, 366 (1975). On the other hand, the Establishment Clause will tolerate measures that only indirectly impact upon religion. *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 771 (1973) ("[N]ot every law that confers an 'indirect,' 'remote,' or 'incidental' benefit upon religious institutions is, for that reason alone, constitutionally invalid.").

The majority holds that the provision of a sign language interpreter to James Zobrest is unconstitutional because it would have the primary effect of advancing religion. The majority raises the specter of a symbolic union of church and state, and dismisses as inapplicable cases in which similar general educational welfare programs have passed constitutional muster.

I strongly disagree with the majority's interpretation of the relevant precedents and fear that they have exalted form over substance at the expense of handicapped children.

In arguing that the provision of an interpreter would have the primary effect of advancing religion, the majority erroneously focuses on the specific use to which the aid will be put in this case. The proper query is whether the program as a whole has the proscribed primary effect of advancing religion. In *Witters*, a blind student sought to apply Washington's vocational rehabilitation assistance to his religious studies at a private Christian college. The Supreme Court held that the primary effect prong of the *Lemon* test did not forbid the aid. In so holding, the Supreme Court analyzed the entirety of Washington's educational assistance for the handicapped program. *Witters*, 474 U.S. at 487-88; *see also id.* at 492 (Powell, J., concurring) (analyzing whether program aids religion only in context of particular case before the court "conflicts both with common sense and precedent").

Similarly, in *Mueller*, the Supreme Court focused not on whether the tax exemption at issue actually permitted the particular parents to send their children to religious schools. Rather, the Court looked to the broad class of beneficiaries of the exemption, which included all parents of school-age children, whether enrolled in public or nonpublic schools, and concluded that " '[t]he provision of benefits to so broad a spectrum . . . is an important index of secular effect.' " 463 U.S. at 397 (quoting *Widmar v. Vincent*, 454 U.S. 263, 274 (1981)); *see also Board of Educ. v. Allen*, 392 U.S. 236, 243-

44 (1968) (the provision of secular textbooks does not have as its necessary effect the advancement of religion because the overall benefits of the program extend to all school children; the Court does not analyze the particular effect of the textbook grant on religious students alone); *Everson v. Board of Educ.*, 330 U.S. 1, 17-18 (1947) (same — with respect to transportation to school). Indeed, the use of the word "primary" in the test connotes a survey of the legislation's total operation, rather than its particular application in the pending case.

I recognize, as does the majority, that the Supreme Court has not always been consistent in applying the primary effects test. In *Hunt*, 413 U.S. at 742, the Supreme Court considered the particular application of a governmental program, rather than its general operation, in assessing primary effect. *See also Bowen v. Kendrick*, 487 U.S. 589, 602 (1988). Given how closely analogous the *Witters* case is to the one at hand — both involve the constitutionality of general educational benefits programs for the handicapped when applied to religious schools — the primary effects test *Witters* prescribes should govern this case. But even assuming that the narrow primary effect test imposed by the majority were correct, I would still hold that the provision of a sign language interpreter to James Zobrest does not have the primary effect of advancing religion. In holding otherwise, the majority and district court misread and misapply the Supreme Court's opinions in *School Dist. of Grand Rapids v. Ball*, 473 U.S.373 (1985) and *Meek v. Pittenger*, 421 U.S. 349. Those cases differ in four significant ways from the one at hand.

First, the legislation at issue in *Grand Rapids* and *Meek* was not the type of general welfare legislation involved here. *Grand Rapids* and *Meek* involve aid programs targeted solely to private schools — the vast majority of which, the Supreme Court emphasized, are sectarian. *Grand Rapids*, 473 U.S. at 384 (forty out of forty-one of Grand Rapids's nonpublic schools "are identifiably religious schools"); *Meek*, 421 U.S.

at 364 (more than 75 percent of Pennsylvania's nonpublic schools "are church-related or religiously affiliated educational institutions"); *see also Public Funds for Public Schools v. Marburger*, 358 F. Supp. 29 (D.N.J. 1973) (three-judge court), *aff'd mem.*, 417 U.S. 961 (1974). In other words, the Supreme Court considers the identification of legislation's primary beneficiary to be a critical consideration in determining whether a statute's primary effect is to benefit religion. *See Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 10-11 (1989) (plurality) (general programs of governmental assistance promoting legitimate secular goals do not have the primary effect of advancing religion even if they relieve religious groups of costs they would otherwise incur; programs targeted exclusively to religious entities, however, are probably unconstitutional).

General welfare programs neutrally available to all children, in both public and private schools, do not suffer the same constitutional disability because their benefits diffuse over the entire population. Religious institutions are incidental, not primary, beneficiaries of such statutory schemes. In *Witters*, the Supreme Court emphasized that Washington's program provided educational assistance to all handicapped students in the state " 'without regard to the sectarian - nonsectarian, or public - nonpublic nature of the institution benefited.' " *Id.* at 487 (quoting *Nyquist*, 413 U.S. at 782-83 n.38). The broad reach of Washington's vocational assistance program guaranteed that no "significant portion of the aid expended under the Washington program as a whole will end up flowing to religious education." *Witters*, 474 U.S. at 488.

Likewise, the EHA is a general welfare program providing benefits such as sign language interpretation to all handicapped children, whether they are enrolled in public or private school. Furthermore, the expansive scope of the EHA and its Arizona counterpart ensures that the bulk of the aid provided will be used in nonsectarian schools. Handicapped children across the country enrolled in public and private schools, not

religious institutions, are the "primary beneficiaries" of the EHA's and Arizona law's benefits.

Indeed, in evaluating the constitutionality of educational aid given only to private schools, the Supreme Court has been at pains to distinguish cases like the one at hand, where the state provides assistance broadly to all schools, all school children, or all parents. In *Meek*, the Court specifically stated:

> The appellants do not challenge and we do not question, the authority of the [state] to make free auxiliary services available to all students in the [state] including those who attend church-related schools. Contrary to the argument advanced in a separate opinion filed today, therefore, *this case presents no question whether the Constitution permits the States to give special assistance to some of its children whose handicaps prevent their deriving the benefit normally anticipated from the education required to become a productive member of society and, at the same time, to deny those benefits to other children only because they attend a Lutheran, Catholic, or other church-sponsored school.*

Id. at 368 n.17 (quotation omitted) (emphasis added); *see also Wolman v. Walter*, 433 U.S. 229, 243 &n.11 (1977); *Nyquist*, 413 at 782-83 n.38. Because the benefits provided by the EHA and Arizona law do not benefit religious institutions primarily or even significantly, those cases holding unconstitutional various forms of aid given only to private schools are not controlling here.

Second, *Grand Rapids* and *Meek* involved educational assistance that either directly or indirectly compensated religious institutions for costs they bore in the course of educating their students. In *Grand Rapids*, state-financed teachers appeared in private schools offering classes to private school students, thus relieving religious institutions of the responsibility (financial and otherwise) of teaching secular subjects. 473 U.S. at 395-97. In *Meek*, the school received instructional materials and equipment directly from the state, disburdening the school of an otherwise necessary cost of performing its educational function. 421 U.S. at 365-66.

The provision of a sign language interpreter, on the other hand, would not result in state funds directly or even indirectly flowing to Salpointe. The public School District, not the private school, employs and pays the interpreter. The provision of an interpreter, moreover, would not relieve Salpointe of any preexisting financial or educational obligation. Nothing in the record or argument suggests that, without state aid, Salpointe itself will undertake the burden of employing an interpreter for James. To the contrary, James's parents have independently hired an interpreter pending the outcome of this litigation.

Third, in *Grand Rapids* and *Meek*, the state, by virtue of its legislation, affirmatively directed educational assistance to religious institutions. By contrast, to the extent Salpointe benefits at all from the EHA program, it does so only as a consequence of independent decisionmaking by the Zobrests. It is because the Zobrests' chose to enroll James in a Catholic high school, and not because of any legislative decree, that EHA benefits will be employed in a sectarian environment. "The historic purposes of the [Establishment] Clause simply do not encompass the sort of attenuated financial benefit, *ultimately controlled by the private choices of individual parents*, that eventually flows to parochial schools from the neutrally available . . . benefit at issue in this case." *Mueller*, 463 U.S. at 400 (emphasis added).

In *Witters*, the Supreme Court found constitutionally significant the fact that religious institutions would receive vocational assistance "only as a result of the genuinely independent and private choices of aid recipients" to attend a religious educational institution. 474 U.S. at 487. The

Supreme Court noted that Washington's vocational assistance program made funds available generally. *Id.* The pupil — not the state — determined whether a religious institution would receive any of the available funds. There, as here, the state created no incentives for students to select sectarian schools and played no role in the decisionmaking process that ultimately determined where the funds would be spent. *Id.* at 488.

Under the EHA and Arizona law, neither the state nor religious bodies can dictate whether, or how much, aid will benefit sectarian institutions. According to the relevant statutory provisions, the sign language interpreter is an employee of the local school district. The sectarian school never receives or even sees the funds used to hire the interpreter. The only persons directly benefiting from the aid are the parents, who are relieved of the financial obligation of paying for a sign language interpreter out of their own pockets, and of course the deaf student. Any indirect benefit enjoyed by Salpointe would be attributable solely to the Zobrests' independent decision to apply neutrally available state aid to their son's education in a sectarian school, and not to any "*State* action sponsoring or subsidizing religion." *Id.* at 488-89 (emphasis in original).

Fourth, unlike *Grand Rapids*, 473 U.S. at 385, no symbolic union of church and state inheres in the simple act of paying the salary of a sign language interpreter. The role played by the interpreter is narrow, isolated, and unique. Private teachers and students, not the interpreter, will be the source of religious doctrine. The state, for its part, is simply facilitating the education of handicapped students on a general and nondiscriminatory basis. That the state's resources will be used to convey sectarian as well as secular ideas does not necessarily create an impermissible union of church and state. *Cf. Board of Educ. v. Mergens*, 469 U.S. 226, ___, 110 S. Ct. 2356, 2372 (1990) (public high school facilities may be used for meetings of religious clubs in part because "secondary school students are mature enough and are likely to understand that

a school does not endorse or support speech that it merely permits on a nondiscriminatory basis").

The majority places undue emphasis on the fact that the interpreter, a state-paid employee, will perform her services in a sectarian classroom. The First Amendment, however, does not absolutely prohibit the placement of state-paid personnel in religious schools. *See Wolman*, 433 U.S. at 241-44 (state may provide health diagnostic technicians to parochial schools). Nor does the First Amendment strictly foreclose the provision of classroom services by the state. *Allen* upheld the provision of textbooks to parochial school children despite the risk that the books' themes would provide the fodder for religious lessons. 392 U.S. at 243-44. *Witter* went even further and authorized the use of state funds to pay a student's tuition at a religious institution, thereby contributing to the salaries of sectarian instructors.

True, the money in *Witters* went first to the student and then to the school, whereas in this case the money goes from the state directly to the interpreter. But First Amendment rights should not depend on how circuitous a money trail the government constructs. Rather, the constitutionality of extending generally-available benefits to parochial students should be determined by reference to the substantive nature and quality of the aid provided. Functional analysis, not formalistic line-drawing, must be undertaken. A careful study of the nature of the sign language interpreter's task belies the majority's concerns about a symbolic union of church and state.

A sign language interpreter performs a mechanical service, changing words from one language into another. An interpreter neither adds to nor detracts from the message she conveys, nor does she interject personal views and philosophies into the translation. Unlike teachers and therapists, the sign language interpreter is a technical facilitator of communication, not a potential fount of religious doctrine.

I do not understand the majority to say that the First Amendment would be offended by the state's provision of a hearing aid or eyeglasses to a parochial school student. Yet these products, like an interpreter, make it possible for a physically-impaired student to receive and decipher religious messages. Perhaps we are not far from the time when machines will be able to translate oral communications into visual cues for the hearing impaired. But we are not there yet. Consequently, because of the nature of his handicap, James Zobrest requires human, rather than purely mechanical, assistance in the classroom. But this distinction should not obscure our evaluation of the nature of the service being performed. A sign language interpreter remains, like a hearing aid, a conveyor, and not an independent source, of communication. Under the circumstances of this case, I do not consider the step from a hearing aid to a sign language interpreter to be a difference of constitutional magnitude.

Further undercutting the majority's symbolic union concern is a recognition that the interpreter's role in the classroom touches only one student. She will not be involved at all in the education of the rest of the student body. Students and the public are thus not likely to be confused by or to have trouble understanding where the state service ends and the religious begins. *Cf. Grand Rapids*, 473 U.S. at 391 ("[S]tudents would be unlikely to discern the crucial difference between the religious school classes and the 'public school' classes.").

That the interpreter's appearance in a Catholic school is wholly attributable to the independent decisionmaking of the parents, rather than the actions of the state, further undercuts any symbolic union of the two entities. *Witters*, 474 U.S. at 488-89 ("Nor does the mere circumstance that petitioner has chosen to use neutrally available state aid to help pay for his religious education confer any message of State endorsement of religion."). In fact, the withholding of vital assistance from a handicapped child solely because of his sincere religious desire to be educated in a Catholic school would evince hos-

tility, not neutrality, towards religion. " 'The Establishment Clause does not license government to . . . subject [religious practitioners] to unique disabilities." *Mergens*, 496 U.S. at ___, 110 S. Ct. at 2371 (quoting *McDaniel v. Paty*, 435 U.S. 618, 641 (1978) (Brennan, J., concurring in judgment)).

Rather than suggest an impermissible connection between church and state, the provision of an interpreter would simply demonstrate to the public the government's desire to equalize the educational opportunities of all its students and to help handicapped students overcome barriers to their full academic development. Such aid is religion-blind.

For the foregoing reasons, I would hold that the provision of a sign language interpreter, under the EHA and Arizona law, to a student enrolled in a religious school does not have the primary effect of advancing religion.

C. *Excessive Entanglement*

The third inquiry prescribed by *Lemon* is determining whether excessive entanglement results from the government's program. To decide whether the provision of a sign language interpreter would sufficiently enmesh the government in religious matters to offend the Establishment Clause, one must assess carefully the interrelationship of church and state that results when such assistance is provided a student.

The district court ruled that state supervision of the interpreter and the nature of her task would unconstitutionally entangle the state in Salpointe's sectarian educational process. The district court noted that, like the therapists whose services were declared unconstitutional in *Wolman*, 433 U.S. 229, the sign language interpreter enjoys close, day-to-day contact with the student in a pervasively religious atmosphere. *Id.* at 247-48. The Supreme Court in *Wolman* felt that this created a danger that "the pressures of the environment might alter [the therapist's] behavior from its normal course" and result

in the transmission of ideological views. *Id.* at 247. The district court perceived the same risk in this case. Although the majority does not reach the entanglement stage of the *Lemon* test, I discuss it to demonstrate the constitutional propriety of affording EHA benefits to parochial students.

In reviewing the district court's decision, I turn first to the question whether supervision of the interpreter's job performance will require the government to intrude unconstitutionally upon Salpointe's religious affairs. Next, I address whether the process of sign language interpretation itself impermissibly involves a state-paid employee in matters of religious doctrine. It should be emphasized at the outset that the mere existence of some interrelationship and cooperation between the School District and Salpointe will not run afoul of the First Amendment. It is only "excessive" entanglement that the Constitution condemns. *Lemon*, 403 U.S. at 613; *cf. Texas Monthly*, 489 U.S. at 10 ("Government need not resign itself to ineffectual diffidence because of exaggerated fears of contagion of or by religion, so long as neither intrudes *unduly* into the affairs of the other.") (emphasis added).

1. *Supervision*

Both parties recognize that the provision of a publicly-funded sign language interpreter necessarily carries with it the baggage of supervision by public officials. The interpreter will receive periodic evaluations of the quality of her work. The School District's special education officials will also need to review at least annually James's educational progress.

Such supervision standing alone does not create constitutionally intolerable levels of state/church involvement. The Constitution will tolerate limited supervisory interactions between public officials and private schools. In *Wolman*, the Supreme Court held that the state's provision of diagnostic health services to private school students did not transgress the Establishment Clause because the program resulted in

only limited contact between public officials, religious officials, and students. 433 U.S. at 244. Likewise, in *Mueller*, the Supreme Court sustained a tax exemption despite the fact that it required public officials to determine whether textbooks promoted religious themes. 463 U.S. at 403. Such carefully channeled interactions do not rise to the level of excessive entanglement. *See also Hernandez v. Commissioner*, 490 U.S. 680, 696-97 (1989) ("[R]outine regulatory interaction which involves no inquiries into religious doctrine, no delegation of state power to a religious body, and no detailed monitoring and close administrative contact between secular and religious bodies does not of itself violate the nonentanglement command.") (quotation and citations omitted); *Allen*, 392 U.S. at 245 (officials may label textbooks as secular or sectarian).

Supervision limited to evaluating the sign language interpreter's job performance does not involve the type of day to day, "comprehensive, discriminatory, and continuing state surveillance" that *Lemon* precludes. 403 U.S. at 619. The School District does not suggest that public officials will appear daily, weekly, or even monthly in the classroom as part of their supervisory work. No extra supervision is needed simply because the interpreter works in a sectarian school.[1]

Evaluations of the interpreter's work, moreover, will not routinely or necessarily involve the supervising officials in

[1]The supervisory entanglement concerns raised by this case thus do not follow the norm. The supervision at issue in an entanglement inquiry frequently pertains to the government's attempts to ensure that its aid is being used only for secular purposes. *See, e.g., Aguilar v. Felton*, 473 U.S. 402, 411 (1985); *Mueller*, 463 U.S. at 403; *Lemon*, 403 U.S. at 616. In this case, however, the supervision relates only to review of a public employee's performance. As in *Witters*, it is a given in this case that the state's assistance cannot be confined to a wholly secular role and will, in fact, permit the recipient to receive religious instruction. The supervision at issue thus avoids the Catch-22 that occurs when the Establishment Clause, on the one hand, requires assurances that aid does not promote sectarian purposes and, on the other hand, uses that very supervision to invalidate the program on entanglement grounds. *See Bowen*, 487 U.S. at 615.

religious matters. Nor does the supervision involve the sheer number of public officials inundating religious establishments that occurred in other cases. The services at issue here, after all, will not be provided to the entire student body. The number of deaf children enrolled in a single parochial school at any given time will be sufficiently low to avoid visiting large numbers of state officials upon the institution. Thus the supervision of James's interpreter will not implicate religious concerns to the same extent as other Establishment Clause cases have.

I would therefore hold that the church/state contacts involved in supervising a sign language interpreter's job performance are sufficiently contained and abbreviated to prevent excessive entanglement.

2. *Nature of the Job*

The second entanglement inquiry concerns the nature of the sign language interpreter's task. The parties stipulated that, as a general matter, the interpreter's code of ethics obliges her to translate communications completely, without altering, editing, or revising in any manner the content of the message. It is conceded that at times the interpreter will be unable to affect a literal translation of a communication, including religious messages. In such circumstances, the interpreter must use her own judgment and, to the best of her ability, convey the message as accurately as possible.

The nature of the interpreter's role in the classroom does not entail excessive entanglement between a state-paid employee and the church. As noted earlier, the First Amendment does not strictly forbid the placement of any public employee in a parochial school classroom. *Wolman*, 433 U.S. at 241-44. While the Court has ruled that the presence of state-financed teachers and therapists or counselors in parochial schools offends the First Amendment, *Grand Rapids*,

473 U.S. at 387; *Meek*, 421 U.S. at 369-71, the concerns animating those holdings do not obtain in this instance.

The primary entanglement concern articulated by the Supreme Court in *Grand Rapids* and *Meek* is an apprehension that the pervasively religious atmosphere in which the professionals work is likely to infuse their teaching or advice with some religious content. *Grand Rapids*, 473 U.S. at 387 ("[T]here is a substantial risk that, overtly or subtly, the religious message they are expected to convey during the regular schoolday will infuse the supposedly secular classes they teach after school. The danger arises 'not because the public employee [is] likely deliberately to subvert [her or] his task to the service of religion, but rather because the pressures of the environment might alter [her or] his behavior from its normal course.' ") (quoting *Wolman*, 433 U.S. at 247); *Meek*, 421 U.S. at 371; *see also Wolman*, 433 U.S. at 247 ("[U]nlike the diagnostician, the therapist may establish a relationship with the pupil in which there might be opportunities to transmit ideological views."); *Lemon*, 403 U.S. at 618-19 ("We simply recognize that a dedicated religious person . . . will inevitably experience great difficulty in remaining religiously neutral. . . . With the best of intentions such a teacher would find it hard to make a total separation between secular teaching and religious doctrine.").

Unlike teachers and therapists, a sign language interpreter's job admits of few, if any, opportunities for the transmission or fostering of personal sectarian sentiments. While recognizing that working as a sign language interpreter is both difficult and challenging, the interpreter's services are distinctly more cabined than those of a teacher or therapist. James's interpreter simply takes a message conceived and uttered by one person and neutrally translates it into a comprehensible form for a second person. The expressions and instruction, religious or not, neither originate nor terminate with the interpreter. As the district court noted, she is just a conduit. Unlike teachers and therapists, her function does not entail the discretion to

introduce her own independent or subjective judgments and opinions, to speak her own words, or to transmit her own ideas. Rather, the interpreter performs the more mechanical and objective task of searching for signs that equate with spoken words, and vice versa. The scientific, technical nature of sign language interpretation thus more closely approximates the services of a speech and hearing diagnostician, than of a teacher.

Occasionally, it is true, non-literal translations will have to be made. But even in these narrow instances, the interpreter's role remains confined to a technical search for words and signs that closely approximate each other. I do not believe that the minimal discretion inhering in such decisions creates an unconstitutional risk that the interpreter will use the opportunity to convey her own religious ideas, in violation of her professional ethical obligation to translate accurately.

In sum, I believe that the provision of a sign language interpreter to James Zobrest under the EHA and Arizona law would not unconstitutionally entangle the state in religious affairs. A careful review of the concerns animating the Supreme Court's First Amendment precedents, a thoughtful study of the nature of an interpreter's services, and due respect for the purpose and effects of educational assistance to handicapped children dictate the conclusion that the provision of a sign language interpreter to a deaf child enrolled in parochial school does not result in an unconstitutional fusion of the secular and the sectarian.

II. *The Free Exercise Clause*

I agree with the majority's conclusion that denying the Zobrests a sign language interpreter unconstitutionally burdens their free exercise of religion.

However, because I do not believe that the provision of a sign language interpreter in this case violates the Establishment Clause of the federal Constitution, I would hold that no compelling interest justifies the state's withholding of benefits. To the extent the School District has an interest in separating church and state further than required by the First Amendment, that interest must yield to the Zobrests' free exercise rights. "[T]he State interest asserted here — in achieving greater separation of Church and State than is already ensured under the Establishment Clause of the Federal Constitution — is limited by the Free Exercise Clause." *Widmar*, 454 U.S. at 276. The Zobrests' free exercise rights would also override any additional anti-establishment constraints imposed by the Arizona constitution. *Id.* at 275-76. The School District has articulated no other reason or interest in withholding aid from the Zobrests.[2]

CONCLUSION

Almost twenty years ago, the Supreme Court observed that:

> the transcendent value of free religious exercise in our constitutional scheme leaves room for "play in the joints" to the extent of cautiously delineated secular governmental assistance to religious schools, despite the fact that such assistance touches on the conflicting values of the Establishment Clause by indirectly benefiting the religious schools. . . .

Norwood v. Harrison, 413 U.S. 455, 469 (1973).

With this statement, the Court capsulized the lessons of nearly two centuries of experience interpreting the First

[2]The parties have not argued that the federal government's desire to separate church and state constitutes a compelling interest overriding the Zobrests' free exercise rights. Accordingly, I do not address either the applicability or constitutionality in this context of the federal prohibition on the use of EHA funds for religious "worship, instruction, or proselytization." 34 C.F.R. § 76.532 (1991).

Amendment's religion clauses. Rigid enforcement of one clause generally comes at the expense of the other. Only through the careful accommodation of evolving constitutional concerns and values — through "play in the joints" — can these competing precepts achieve their common goal of preserving freedom of religion.

I believe that the provision of a sign language interpreter to a deaf child enrolled in parochial school constitutes such "cautiously delineated secular governmental assistance." Government's provision of this general welfare benefit to all qualifying school children equally does not create an impermissible establishment of religion. On the other hand, singling out for exclusion from this benefit program only those students engaged in religious conduct compelled by conscience does offend the Free Exercise Clause.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

LARRY ZOBREST, Plaintiff,	)	
vs.	)	NO. CIV-88-516-TUC-RMB
CATALINA FOOTHILLS SCHOOL DISTRICT, Defendant.	)	ORDER

Based upon the stipulated facts in the record it is clear that plaintiff James Zobrest requires the services of a sign language interpreter at Salpointe Catholic High School. However, the provision of a publicly-paid sign language interpreter at Salpointe, a pervasively sectarian school, would violate the separation of church and state.

As noted in this Court's order denying the plaintiffs' Motion for a Preliminary Injunction, the role of a sign language interpreter is more analogous to a therapist than a diagnostician. *Wolman v. Walter,* 433 U.S. 229, 244-47, 97 S.Ct. 2593, 2603-05, 53 L.Ed.2d 714 (1977). The interpreter would act as a conduit for the religious inculcation of James – thereby, promoting James's religious development at government expense. That kind of entanglement of church and state is not allowed. *See Aguilar v. Fenton,* 473 U.S. 402, 105 S.Ct. 3232, 87 L.Ed.2d 290 (1985); *School Dist. of Grand Rapids v. Ball,* 473 U.S. 373, 105 S.Ct. 3216, 87 L.Ed.2d 267 (1985); *Meek v. Pittenger,* 421 U.S. 349, 95 S.Ct. 1752, 44 L.Ed.2d 217 (1975).

Therefore, IT IS ORDERED that the plaintiffs' Motion for Summary Judgment is DENIED and the defendant's Cross-motion for Summary Judgment is GRANTED and this action is DISMISSED.

DATED: July 18, 1989. /s/ RICHARD M. BILBY
Richard M. Bilby
United States District Judge

United States District Court

DISTRICT OF ARIZONA

LARRY ZOBREST, Plaintiff,	)	
vs.	)	CASE NUMBER:
CATALINA FOOTHILLS SCHOOL DISTRICT,	)	CIV 88-516-TUC-RMB
Defendant.	)	

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

XXX☐ **Decision by Court.** This action came hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Judgement is entered in favor of the Defendant and against the Plaintiff.

July 19, 1989 — Date

RICHARD H. WEARE — Clerk

/s/ VIRGINIA ABEYTA — *(By) Deputy Clerk*

APPENDIX D

SUBCHAPTER I – GENERAL PROVISIONS

§ 1400. Congressional statements and declarations

(a) Short title

This chapter may be cited as the "Education of the Handicapped Act".

(b) Findings

The Congress finds that –

(1) there are more than eight million handicapped children in the United States today;

(2) the special educational needs of such children are not being fully met;

(3) more than half of the handicapped children in the United States do not receive appropriate educational services which would enable them to have full equality of opportunity;

(4) one million of the handicapped children in the United States are excluded entirely from the public school system and will not go through the educational process with their peers;

(5) there are many handicapped children throughout the United States participating in regular school programs whose handicaps prevent them from having a successful educational experience because their handicaps are undetected;

(6) because of the lack of adequate services within the public school system, families are often forced to find services outside the public school system, often at great distance from their residence and at their own expense;

(7) developments in the training of teachers and in diagnostic and instructional procedures and methods have advanced to the point that, given appropriate funding, State and local educational agencies can and will provide effective special education and related services to meet the needs of handicapped children;

(8) State and local educational agencies have a responsibility to provide education for all handicapped children, but present financial resources are inadequate to meet the special educational needs of handicapped children; and

(9) it is in the national interest that the Federal Government assist State and local efforts to provide programs to meet the educational needs of handicapped children in order to assure equal protection of the law.

(c) Purpose

It is the purpose of this chapter to assure that all handicapped children have available to them, within the time periods specified in section 1412(2)(B) of this title, a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of handicapped children and their parents or guardians are protected, to assist States and localities to provide for the education of all handicapped children, and to assess and assure the effectiveness of efforts to educate handicapped children.

§ 1401. Definitions

(a) As used in this chapter—

(1) The term "handicapped children" means mentally retarded, hard of hearing, deaf, speech or language impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, or

other health impaired children, or children with specific learning disabilities, who by reason thereof require special education and related services.

(2) Repealed. Pub.L. 98-199, § 2(2), Dec. 2, 1983, 97 Stat. 1357.

(3) Repealed. Pub.L. 100-630, Title I, § 101(a)(2), Nov. 7, 1988, 102 Stat. 3289.

(4) The term "construction", except where otherwise specified, means (A) erection of new or expansion of existing structures, and the acquisition and installation of equipment therefor; or (B) acquisition of existing structures not owned by any agency or institution making application for assistance under this chapter; or (C) remodeling or alteration (including the acquisition, installation, modernization, or replacement of equipment) of existing structures; or (D) acquisition of land in connection with the activities in clauses (A), (B), and (C); or (E) a combination of any two or more of the foregoing.

(5) The term "equipment" includes machinery, utilities, and built-in equipment and any necessary enclosures or structures to house them, and includes all other items necessary for the functioning of a particular facility as a facility for the provision of educational services, including items such as instructional equipment and necessary furniture, printed, published, and audio-visual instructional materials, telecommunications, sensory, and other technological aids and devices, and books, periodicals, documents, and other related materials.

(6) The term "State" means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American

Samoa, the Commonwealth of the Northern Mariana Islands, or the Trust Territory of the Pacific Islands.

(7) The term "State educational agency" means the State board of education or other agency or officer primarily responsible for the State supervision of public elementary and secondary schools, or, if there is no such officer or agency, an officer or agency designated by the Governor or by State law.

(8) The term "local educational agency" means a public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary or secondary schools in a city, county, township, school district, or other political subdivision of a State, or such combination of school districts or counties as are recognized in a State as an administrative agency for its public elementary or secondary schools. Such term also includes any other public institution or agency having administrative control and direction of a public elementary or secondary school.

(9) The term "elementary school" means a day or residential school which provides elementary education, as determined under State law.

(10) The term "secondary school" means a day or residential school which provides secondary education, as determined under State law, except that it does not include any education provided beyond grade 12.

(11) The term "institution of higher education" means an educational institution in any State which—

(A) admits as regular students only individuals having a certificate of graduation from a

high school, or the recognized equivalent of such a certificate;

(B) is legally authorized within such State to provide a program of education beyond high school;

(C) provides an educational program for which it awards a bachelor's degree, or provides not less than a two-year program which is acceptable for full credit toward such a degree, or offers a two-year program in engineering, mathematics, or the physical or biological sciences which is designed to prepare the student to work as a technician and at a semiprofessional level in engineering, scientific, or other technological fields which require the understanding and application of basic engineering, scientific, or mathematical principles or knowledge;

(D) is a public or other nonprofit institution; and

(E) is accredited by a nationally recognized accrediting agency or association listed by the Secretary pursuant to this paragraph or, if not so accredited, is an institution whose credits are accepted, on transfer, by not less than three institutions which are so accredited, for credit on the same basis as if transferred from an institution so accredited: *Provided, however,* That in the case of an institution offering a two-year program in engineering, mathematics, or the physical or biological sciences which is designed to prepare the student to work as a technician and at a semiprofessional level in engineering, scientific, or technological fields which require the understanding and application of basic engineering, scientific, or mathematical principles or knowledge, if the Secretary

determines that there is no nationally recognized accrediting agency or association qualified to accredit such institutions, the Secretary shall appoint an advisory committee, composed of persons specially qualified to evaluate training provided by such institutions, which shall prescribe the standards of content, scope, and quality which must be met in order to qualify such institutions to participate under this Act and shall also determine whether particular institutions meet such standards. For the purposes of this paragraph the Secretary shall publish a list of nationally recognized accrediting agencies or associations which the Secretary determines to be reliable authority as to the quality of education or training offered.

The term includes community colleges receiving funding from the Secretary of the Interior under the Tribally Controlled Community College Assistance Act of 1978 [20 U.S.C.A. § 1801 et seq.]

(12) The term "nonprofit" as applied to a school, agency, organization, or institution means a school, agency, organization, or institution owned and operated by one or more nonprofit corporations or associations no part of the net earnings of which inures, or may lawfully inure, to the benefit of any private shareholder or individual.

(13) The term "research and related purposes" means research, research training (including the payment of stipends and allowances), surveys, or demonstrations in the field of education of handicapped children, or the dissemination of information derived therefrom, including (but without limitation) experimental schools.

(14) The term "Secretary" means the Secretary of Education.

(15) The term "children with specific learning disabilities" means those children who have a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations. Such disorders include such conditions as perceptual handicaps, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. Such term does not include children who have learning problems which are primarily the result of visual, hearing, or motor handicaps, of mental retardation, of emotional disturbance, or of environmental, cultural, or economic disadvantage.

(16) The term "special education" means specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions.

(17) The term "related services" means transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education, and includes the early identification and assessment of handicapping conditions in children.

(18) The term "free appropriate public education" means special education and related services that—

(A) have been provided at public expense, under public supervision and direction, and without charge,

(B) meet the standards of the State educational agency,

(C) include an appropriate preschool, elementary, or secondary school education in the State involved, and

(D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title.

(19) The term "individualized education program" means a written statement for each handicapped child developed in any meeting by a representative of the local educational agency or an intermediate educational unit who shall be qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of handicapped children, the teacher, the parents or guardian of such child, and, whenever appropriate, such child, which statement shall include –

(A) a statement of the present levels of educational performance of such child,

(B) a statement of annual goals, including short-term instructional objectives,

(C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs,

(D) the projected date for initiation and anticipated duration of such services, and

(E) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved.

(20) The term "excess costs" means those costs which are in excess of the average annual per student expenditure in a local educational agency during the preceding school year for an elementary or secondary school student, as may be appropriate,

and which shall be computed after deducting –

(A) amounts received –

(i) under this subchapter,

(ii) under chapter 1 of title I of the Elementary and Secondary Education Act of 1965 [20 U.S.C.A. § 2701 et seq.], or

(iii) under title VII of the Elementary and Secondary Education Act of 1965 [20 U.S.C.A. § 3281 et seq.], and

(B) any State or local funds expended for programs that would qualify for assistance under such subchapter, chapter, or title.

(21) The term "native language" has the meaning given that term by section 703(a)(2) of the Bilingual Education Act.

(22) The term "intermediate educational unit" means any public authority, other than a local educational agency, which is under the general supervision of a State educational agency, which is established by State law for the purpose of providing free public education on a regional basis, and which provides special education and related services to handicapped children within the State.

(23)(A) The term "public or private nonprofit agency or organization" includes an Indian tribe.

(B) The terms "Indian", "American Indian", and "Indian American" mean an individual who is a member of an Indian tribe.

(C) The term "Indian tribe" means any Federal or State Indian tribe, band, rancheria, pueblo, colony, or community, including any Alaskan native village or regional village corporation (as defined in or established under the Alaska Native Claims Settlement Act [43 U.S.C.A. § 1601 et seq.]).

(b) For purposes of subchapter III of this chapter, "handicapped youth" means any handicapped child (as defined in subsection (a)(1) of this section) who–

(1) is twelve years of age or older; or

(2) is enrolled in the seventh or higher grade in school.

§1412. Eligibility requirements

In order to qualify for assistance under this subchapter in any fiscal year, a State shall demonstrate to the Secretary that the following conditions are met:

(1) The State has in effect a policy that assures all handicapped children the right to a free appropriate public education.

(2) The State has developed a plan pursuant to section 1413(b) of this title in effect prior to November 29, 1975, and submitted not later than August 21, 1975, which will be amended so as to comply with the provisions of this paragraph. Each such amended plan shall set forth in detail the policies and procedures which the State will undertake or has undertaken in order to assure that–

(A) there is established (i) a goal of providing full educational opportunity to all handicapped children, (ii) a detailed timetable for accomplishing such a goal, and (iii) a description of the kind and number of facilities, personnel, and services necessary throughout the State to meet such a goal;

(B) a free appropriate public education will be available for all handicapped children between the ages of three and eighteen within the State not later than September 1, 1978, and for all handicapped children between the ages of three and twenty-one within the State not later than September 1, 1980, except that, with respect to handicapped children aged three to five and aged eighteen to twenty-one, inclusive, the requirements of this clause shall not be applied in any State if the application of such requirements would be inconsistent with State law or practice, or the order of any court, respecting public education within such age groups in the State;

(C) all children residing in the State who are handicapped, regardless of the severity of their handicap, and who are in need of special education and related services are identified, located and evaluated, and that a practical method is developed and implemented to determine which children are currently receiving needed special education and related services and which children are not currently receiving needed special education and related services;

(D) policies and procedures are established in accordance with detailed criteria prescribed under section 1417(c) of this title; and

(E) any amendment to the plan submitted by the State required by this section shall be available to parents, guardians, and other members of the general public at least thirty days prior to the date of submission of the amendment to the Secretary.

(3) The State has established priorities for providing a free appropriate public education to all handicapped children, which priorities shall meet

the timetables set forth in clause (B) of paragraph (2) of this section, first with respect to handicapped children who are not receiving an education, and second with respect to handicapped children, within each disability, with the most severe handicaps who are receiving an inadequate education, and has made adequate progress in meeting the timetables set forth in clause (B) of paragraph (2) of this section.

(4) Each local educational agency in the State will maintain records of the individualized education program for each handicapped child, and such program shall be established, reviewed, and revised as provided in section 1414(a)(5) of this title.

(5) The State has established (A) procedural safeguards as required by section 1415 of this title, (B) procedures to assure that, to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and that special classes, separate schooling, or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily, and (C) procedures to assure that testing and evaluation materials and procedures utilized for the purposes of evaluation and placement of handicapped children will be selected and administered so as not to be racially or culturally discriminatory. Such materials or procedures shall be provided and administered in the child's native language or mode of communication, unless it clearly is not feasible to do so, and no single procedure shall be the sole criterion for determining an appropriate educational program for a child.

(6) The State educational agency shall be responsible for assuring that the requirements of this subchapter are carried out and that all educational programs for handicapped children within the State, including all such programs administered by any other State or local agency, will be under the general supervision of the persons responsible for educational programs for handicapped children in the State educational agency and shall meet education standards of the State educational agency. This paragraph shall not be construed to limit the responsibility of agencies other than educational agencies in a State from providing or paying for some or all of the costs of a free appropriate public education to be provided handicapped children in the State.

(7) The State shall assure that (A) in carrying out the requirements of this section procedures are established for consultation with individuals involved in or concerned with the education of handicapped children, including handicapped individuals and parents or guardians of handicapped children, and (B) there are public hearings, adequate notice of such hearings, and an opportunity for comment available to the general public prior to adoption of the policies, programs, and procedures required pursuant to the provisions of this section and section 1413 of this title.

§1413. State plans

(a) Requisite features

Any State meeting the eligibility requirements set forth in section 1412 of this title and desiring to participate in the program under this subchapter shall submit to the Secretary, through its State educational agency, a State plan at such time, in such manner, and containing or accompanied by such information, as the Secretary deems necessary. Each such plan shall—

(1) set forth policies and procedures designed to assure that funds paid to the State under this subchapter will be expended in accordance with the provisions of this subchapter, with particular attention given to the provisions of sections 1411(b), 1411(c), 1411(d), 1412(2), and 1412(3) of this title;

(2) provide that programs and procedures will be established to assure that funds received by the State or any of its political subdivisions under any other Federal program, including subpart 2 of part D of chapter 1 of title I of the Elementary and Secondary Education Act of 1965 [20 U.S.C.A. §2791 et seq.] and section 2332(1) of this title, under which there is specific authority for the provision of assistance for the education of handicapped children, will be utilized by the State, or any of its political subdivisions, only in a manner consistent with the goal of providing a free appropriate public education for all handicapped children, except that nothing in this clause shall be construed to limit the specific requirements of the laws governing such Federal programs;

(3) set forth, consistent with the purposes of this Act, a description of programs and procedures for—

(A) the development and implementation of a comprehensive system of personnel development, which shall include—

(i) inservice training of general and special educational instructional and support personnel,

(ii) detailed procedures to assure that all personnel necessary to carry out the purposes of this Act are appropriately and adequately prepared and trained, and

(iii) effective procedures for acquiring and disseminating to teachers and administrators of programs for handicapped children significant information derived from educational research, demonstration, and similar projects, and

(B) adopting, where appropriate, promising educational practices and materials developed through such projects;

(4) set forth policies and procedures to assure—

(A) that, to the extent consistent with the number and location of handicapped children in the State who are enrolled in private elementary and secondary schools, provision is made for the participation of such children in the program assisted or carried out under this subchapter by providing for such children special education and related services; and

(B) that—

(i) handicapped children in private schools and facilities will be provided special education and related services (in conformance with an individualized education program as required by this subchapter) at no cost to their parents or guardian, if such children are placed in or referred to such schools or facilities by the State or appropriate local educational agency as the means of carrying out the requirements of this subchapter or any other applicable law requiring the provision of special education and related services to all handicapped children within such State; and

(ii) in all such instances, the State educational agency shall determine whether such schools and facilities meet

standards that apply to State and local educational agencies and that children so served have all the rights they would have if served by such agencies;

(5) set forth policies and procedures which assure that the State shall seek to recover any funds made available under this subchapter for services to any child who is determined to be erroneously classified as eligible to be counted under section 1411(a) or 1411(d) of this title;

(6) provide satisfactory assurance that the control of funds provided under this subchapter, and title to property derived therefrom, shall be in a public agency for the uses and purposes provided in this subchapter, and that a public agency will administer such funds and property;

(7) provide for—

(A) making such reports in such form and containing such information as the Secretary may require to carry out the Secretary's functions under this subchapter, and

(B) keeping such records and affording such access thereto as the Secretary may find necessary to assure the correctness and verification of such reports and proper disbursement of Federal funds under this subchapter;

(8) provide procedures to assure that final action with respect to any application submitted by a local educational agency or an intermediate educational unit shall not be taken without first affording the local educational agency or intermediate educational unit involved reasonable notice and opportunity for a hearing;

(9) provide satisfactory assurance that Federal funds made available under this subchapter—

(A) will not be commingled with State funds, and

(B) will be so used as to supplement and increase the level of Federal, State, and local funds (including funds that are not under the direct control of State or local educational agencies) expended for special education and related services provided to handicapped children under this subchapter and in no case to supplant such Federal, State, and local funds, except that, where the State provides clear and convincing evidence that all handicapped children have available to them a free appropriate public education, the Secretary may waive in part the requirement of this subparagraph if the Secretary concurs with the evidence provided by the State;

(10) provide, consistent with procedures prescribed pursuant to section 1417(a)(2) of this title, satisfactory assurance that such fiscal control and fund accounting procedures will be adopted as may be necessary to assure proper disbursement of, and accounting for, Federal funds paid under this subchapter to the State, including any such funds paid by the State to local educational agencies and intermediate educational units;

(11) provide for procedures for evaluation at least annually of the effectiveness of programs in meeting the educational needs of handicapped children (including evaluation of individualized education programs), in accordance with such criteria that the Secretary shall prescribe pursuant to section 1417 of this title;

(12) provide that the State has an advisory panel, appointed by the Governor or any other official authorized under State law to make such appointments, composed of individuals involved in

or concerned with the education of handicapped children, including handicapped individuals, teachers, parents or guardians of handicapped children, State and local education officials, and administrators of programs for handicapped children, which—

(A) advises the State educational agency of unmet needs within the State in the education of handicapped children,

(B) comments publicly on any rules or regulations proposed for issuance by the State regarding the education of handicapped children and the procedures for distribution of funds under this subchapter, and

(C) assists the State in developing and reporting such data and evaluations as may assist the Secretary in the performance of the responsibilities of the Secretary under section 1418 of this title;

(13) set forth policies and procedures for developing and implementing interagency agreements between the State educational agency and other appropriate State and local agencies to—

(A) define the financial responsibility of each agency for providing children and youth with free appropriate public education, and

(B) resolve interagency disputes, including procedures under which local educational agencies may initiate proceedings under the agreement in order to secure reimbursement from other agencies or otherwise implement the provisions of the agreement; and

(14) set forth policies and procedures relating to the establishment and maintenance of standards to ensure that personnel necessary to carry out the purposes of this subchapter are appropriately and adequately prepared and trained, including—

(A) the establishment and maintenance of standards which are consistent with any State approved or recognized certification, licensing, registration, or other comparable requirements which apply to the area in which such personnel are providing special education or related services, and

(B) to the extent such standards are not based on the highest requirements in the State applicable to a specific profession or discipline, the steps the State is taking to require the retraining or hiring of personnel that meet appropriate professional requirements in the State.

(b) Additional assurances

Whenever a State educational agency provides free appropriate public education for handicapped children, or provides direct services to such children, such State educational agency shall include, as part of the State plan required by subsection (a) of this section, such additional assurances not specified in such subsection (a) of this section as are contained in section 1414(a) of this title, except that funds available for the provision of such education or services may be expended without regard to the provisions relating to excess costs in section 1414(a) of this title.

(c) Notice and hearing prior to disapproval of plan

(1) The Secretary shall approve any State plan and any modification thereof which—

(A) is submitted by a State eligible in accordance with section 1412 of this title; and

(B) meets the requirements of subsection (a) and subsection (b) of this section.

(2) The Secretary shall disapprove any State plan which does not meet the requirements of paragraph (1),

but shall not finally disapprove a State plan except after reasonable notice and opportunity for a hearing to the State.

(d) **Participation of handicapped children in private schools; payment of Federal amount; determinations of Secretary: notice and hearing; judicial review: jurisdiction of court of appeals, petition, record, conclusiveness of findings, remand, review by Supreme Court**

(1) If, on December 2, 1983, a State educational agency is prohibited by law from providing for the participation in special programs of handicapped children enrolled in private elementary and secondary schools as required by subsection (a)(4) of this section, the Secretary shall waive such requirement, and shall arrange for the provision of services to such children through arrangements which shall be subject to the requirements of subsection (a)(4) of this section.

(2)(A) When the Secretary arranges for services pursuant to this subsection, the Secretary, after consultation with the appropriate public and private school officials, shall pay to the provider of such services an amount per child which may not exceed the Federal amount provided per child under this subchapter to all handicapped children enrolled in the State for services for the fiscal year preceding the fiscal year for which the determination is made.

(B) Pending final resolution of any investigation or complaint that could result in a determination under this subsection, the Secretary may withhold from the allocation of the affected State educational agency the amount the Secretary estimates would be necessary to pay the cost of such services.

(C) Any determination by the Secretary under this section shall continue in effect until the Secretary determines that there will no longer be any failure or

inability on the part of the State educational agency to meet the requirements of subsection (a)(4) of this section.

(3)(A) The Secretary shall not take any final action under this subsection until the State educational agency affected by such action has had an opportunity, for at least 45 days after receiving written notice thereof, to submit written objections and to appear before the Secretary or the Secretary's designee to show cause why such action should not be taken.

(B) If a State educational agency is dissatisfied with the Secretary's final action after a proceeding under subparagraph (A) of this paragraph, it may, within 60 days after notice of such action, file with the United States court of appeals for the circuit in which such State is located a petition for review of that action. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Secretary. The Secretary thereupon shall file in the court the record of the proceedings on which the Secretary based the Secretary's action, as provided in section 2112 of Title 28.

(C) The findings of fact by the Secretary, if supported by substantial evidence, shall be conclusive; but the court, for good cause shown, may remand the case to the Secretary to take further evidence, and the Secretary may thereupon make new or modified findings of fact and may modify the Secretary's previous action, and shall file in the court the record of the further proceedings. Such new or modified findings of fact shall likewise be conclusive if supported by substantial evidence.

(D) Upon the filing of a petition under subparagraph (B), the court shall have jurisdiction to affirm the action of the Secretary or to set it aside, in whole or in part. The judgment of the court shall be subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of Title 28.

(e) Prohibition on reduction of assistance

This chapter shall not be construed to permit a State to reduce medical and other assistance available or to alter eligibility under titles V and XIX of the Social Security Act [42 U.S.C. §§ 701 et seq., 1396 et seq.] with respect to the provision of a free appropriate public education for handicapped children within the State.

§1414. Application

(a) Requisite features

A local educational agency or an intermediate educational unit which desires to receive payments under section 1411(d) of this title for any fiscal year shall submit an application to the appropriate State educational agency. Such application shall—

(1) provide satisfactory assurance that payments under this subchapter will be used for excess costs directly attributable to programs which—

(A) provide that all children residing within the jurisdiction of the local educational agency or the intermediate educational unit who are handicapped, regardless of the severity of their handicap, and are in need of special education and related services will be identified, located, and evaluated, and provide for the inclusion of a practical method of determining which children are currently receiving needed special education and related services and which children are not currently receiving such education and services;

(B) establish policies and procedures in accordance with detailed criteria prescribed under section 1417(c) of this title;

(C) establish a goal of providing full educational opportunities to all handicapped children, including—

(i) procedures for the implementation and use of the comprehensive system of personnel development established by the State educational agency under section 1413(a)(3) of this title;

(ii) the provision of, and the establishment of priorities for providing, a free appropriate public education to all handicapped children, first with respect to handicapped children who are not receiving an education, and second with respect to handicapped children, within each disability, with the most severe handicaps who are receiving an inadequate education.

(iii) the participation and consultation of the parents or guardian of such children; and

(iv) to the maximum extent practicable and consistent with the provisions of section 1412(5)(B) of this title, the provision of special services to enable such children to participate in regular educational programs;

(D) establish a detailed timetable for accomplishing the goal described in subclause (C); and

(E) provide a description of the kind and number of facilities, personnel, and services necessary to meet the goal described in subclause (C);

(2) provide satisfactory assurance that—

(A) the control of funds provided under this subchapter, and title to property derived from such funds, shall be in a public agency for the uses and purposes provided in this subchapter, and that a public agency will administer such funds and property;

(B) Federal funds expended by local educational agencies and intermediate educational units for programs under this subchapter—

(i) shall be used to pay only the excess costs directly attributable to the education of handicapped children; and

(ii) shall be used to supplement and, to the extent practicable, increase the level of State and local funds expended for the education of handicapped children, and in no case to supplant such State and local funds; and

(C) State and local funds will be used in the jurisdiction of the local educational agency or intermediate educational unit to provide services in program areas that, taken as a whole, are at least comparable to services being provided in areas of such jurisdiction that are not receiving funds under this subchapter;

(3) provide for—

(A) furnishing such information (which, in the case of reports relating to performance, is in accordance with specific performance criteria related to program objectives), as may be necessary to enable the State educational agency to perform its duties under this subchapter, including information relating to the educational achievement of handicapped children participating in programs carried out under this subchapter; and

(B) keeping such records, and affording such access to such records, as the State educational agency may find necessary to assure the correctness and verification of such information furnished under subparagraph (A);

(4) provide for making the application and all pertinent documents related to such application available to parents, guardians, and other members of the general public, and provide that all evaluations and reports required under clause (3) shall be public information;

(5) provide assurances that the local educational agency or intermediate educational unit will establish or revise, whichever is appropriate, an individualized education program for each handicapped child at the beginning of each school year and will then review and, if appropriate, revise, its provisions periodically, but not less than annually;

(6) provide satisfactory assurance that policies and programs established and administered by the local educational agency or intermediate educational unit shall be consistent with the provisions of paragraph (1) through paragraph (7) of section 1412 and section 1413(a) of this title; and

(7) provide satisfactory assurance that the local educational agency or intermediate educational unit will establish and maintain procedural safeguards in accordance with the provisions of sections 1412(5)(B), 1412(5)(C), and 1415 of this title.

§1415. Procedural safeguards

(a) Establishment and maintenance

Any State educational agency, any local educational agency, and any intermediate educational unit which receives assistance under this subchapter shall establish and maintain procedures in accordance with subsection (b) through subsection (e) of this section to assure that handicapped children and their parents or guardians are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies and units.

(b) Required procedures; hearing

(1) The procedures required by this section shall include, but shall not be limited to–

(A) an opportunity for the parents or guardian of a handicapped child to examine all relevant records with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child;

(B) procedures to protect the rights of the child whenever the parents or guardian of the child are not known, unavailable, or the child is a ward of the State, including the assignment of an individual (who shall not be an employee of the State educational agency, local educational agency, or intermediate educational unit involved in the education or care of the child) to act as a surrogate for the parents or guardian;

(C) written prior notice to the parents or guardian of the child whenever such agency or unit–

(i) proposes to initiate or change, or

(ii) refuses to initiate or change,

the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child;

(D) procedures designed to assure that the notice required by clause (C) fully informs the parents or guardian, in the parents' or guardian's native language, unless it clearly is not feasible to do so, of all procedures available pursuant to this section; and

(E) an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or

the provision of a free appropriate public education to such child.

(2) Whenever a complaint has been received under paragraph (1) of this subsection, the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency or by the local educational agency or intermediate educational unit, as determined by State law or by the State educational agency. No hearing conducted pursuant to the requirements of this paragraph shall be conducted by an employee of such agency or unit involved in the education or care of the child.

(c) Review of local decision by State educational agency

If the hearing required in paragraph (2) of subsection (b) of this section is conducted by a local educational agency or an intermediate educational unit, any party aggrieved by the findings and decision rendered in such a hearing may appeal to the State educational agency which shall conduct an impartial review of such hearing. The officer conducting such review shall make an independent decision upon completion of such review.

(d) Enumeration of rights accorded parties to hearings

Any party to any hearing conducted pursuant to subsections (b) and (c) of this section shall be accorded–

(1) the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of handicapped children.

(2) the right to present evidence and confront, cross-examine, and compel the attendance of witnesses,

(3) the right to a written or electronic verbatim record of such hearing, and

(4) the right to written findings of fact and decisions (which findings and decisions shall be made available to the public consistent with the requirements of section 1417(c) of this title and shall also be transmitted to the advisory panel established pursuant to section 1413(a)(12) of this title).

(e) Civil action; jurisdiction

(1) A decision made in a hearing conducted pursuant to paragraph (2) of subsection (b) of this section shall be final, except that any party involved in such hearing may appeal such decision under the provisions of subsection (c) and paragraph (2) of this subsection. A decision made under subsection (c) of this section shall be final, except that any party may bring an action under paragraph (2) of this subsection.

(2) Any party aggrieved by the findings and decision made under subsection (b) of this section who does not have the right to an appeal under subsection (c) of this section, and any party aggrieved by the findings and decision under subsection (c) of this section, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

(3) During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current

educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed.

(4)(A) The district courts of the United States shall have jurisdiction of actions brought under this subsection without regard to the amount in controversy.

(B) In any action or proceeding brought under this subsection, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents or guardian of a handicapped child or youth who is the prevailing party.

(C) For the purpose of this subsection, fees awarded under this subsection shall be based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished. No bonus or multiplier may be used in calculating the fees awarded under this subsection.

(D) No award of attorneys' fees and related costs may be made in any action or proceeding under this subsection for services performed subsequent to the time of a written offer of settlement to a parent or guardian, if—

(i) the offer is made within the time prescribed by Rule 68 of the Federal Rules of Civil Procedure or, in the case of an administrative proceeding, at any time more than ten days before the proceeding begins;

(ii) the offer is not accepted within ten days; and

(iii) the court or administrative officer finds that the relief finally obtained by the parents or guardian is not more favorable to the parents or guardian than the offer of settlement.

(E) Notwithstanding the provisions of subparagraph (D), an award of attorneys' fees and related costs

may be made to a parent or guardian who is the prevailing party and who was substantially justified in rejecting the settlement offer.

(F) Whenever the court finds that –

(i) the parent or guardian, during the course of the action or proceeding, unreasonably protracted the final resolution of the controversy;

(ii) the amount of the attorneys' fees otherwise authorized to be awarded unreasonably exceeds the hourly rate prevailing in the community for similar services by attorneys of reasonably comparable skill, experience, and reputation; or

(iii) the time spent and legal services furnished were excessive considering the nature of the action or proceeding

the court shall reduce, accordingly, the amount of the attorneys' fees awarded under this subsection.

(G) The provisions of subparagraph (F) shall not apply in any action or proceeding if the court finds that the State or local educational agency unreasonably protracted the final resolution of the action or proceeding or there was a violation of this section.

(f) Effect on other laws

Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, title V of the Rehabilitation Act of 1973 [29 U.S.C.A. § 790 et seq.], or other Federal statutes protecting the rights of handicapped children and youth, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (b)(2) and (c) of this section shall be exhausted to the same extent as would be required had the action been brought under this subchapter.

APPENDIX E

(From 34 Code of Federal Regulations)

§ 76.532 Use of funds for religion prohibited.

(a) No State or subgrantee may use its grant or subgrant to pay for any of the following:

(1) Religious worship, instruction, or proselytization.

(2) Equipment or supplies to be used for any of the activities specified in paragraph (a)(1) of this section.

(3) Construction, remodeling, repair, operation, or maintenance of any facility or part of a facility to be used for any of the activities specified in paragraph (a)(1) of this section.

§ 76.651 Responsibility of a State and a subgrantee.

(a)(1) A subgrantee shall provide students enrolled in private schools with a genuine opportunity for equitable participation in accordance with the requirements in §§ 76.652-76.662 and in the authorizing statute and implementing regulations for a program.

(2) The subgrantee shall provide that opportunity to participate in a manner that is consistent with the number of eligible private school students and their needs.

(3) The subgrantee shall maintain continuing administrative direction and control over funds and property that benefit students enrolled in private schools.

(b)(1) A State shall ensure that each subgrantee complies with the requirements in §§ 76.651-76.662.

(2) If a State carries out a project directly, it shall comply with these requirements as if it were a subgrantee.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 76.652 Consultation with representatives of private school students.

(a) An applicant for a subgrant shall consult with appropriate representatives of students enrolled in private schools during all phases of the development and design of the project covered by the application, including consideration of:

(1) Which children will receive benefits under the project;

(2) How the children's needs will be identified;

(3) What benefits will be provided;

(4) How the benefits will be provided; and

(5) How the project will be evaluated.

(b) A subgrantee shall consult with appropriate representatives of students enrolled in private schools before the subgrantee makes any decision that affects the opportunities of those students to participate in the project.

(c) The applicant or subgrantee shall give the appropriate representatives a genuine opportunity to express their views regarding each matter subject to the consultation requirements in this section.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 76.653 Needs, number of students, and types of services.

A subgrantee shall determine the following matters on a basis comparable to that used by the subgrantee in providing for participation of public school students:

(a) The needs of students enrolled in private schools.

(b) The number of those students who will participate in a project.

(c) The benefits that the subgrantee will provide under the program to those students.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 76.654 Benefits for private school students.

(a) *Comparable benefits.* The program benefits that a subgrantee provides for students enrolled in private schools must be comparable in quality, scope, and opportunity for participation to the program benefits that the subgrantee provides for students enrolled in public schools.

(b) *Same Benefits.* If a subgrantee uses funds under a program for public school students in a particular attendance area, or grade or age level, the subgrantee shall insure equitable opportunities for participation by students enrolled in private schools who:

(1) Have the same needs as the public school students to be served; and

(2) Are in that group, attendance area, or age or grade level.

(c) *Different benefits.* If the needs of students enrolled in private schools are different from the needs of students enrolled in public schools, a subgrantee shall provide program benefits for the private school students that are different from the benefits the subgrantee provides for the public school students.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 76.655 Level of expenditures for students enrolled in private schools.

(a) Subject to paragraph (b) of this section, a subgrantee shall spend the same average amount of program funds on:

(1) A student enrolled in a private school who receives benefits under the program; and

(2) A student enrolled in a public school who receives benefits under the program.

(b) The subgrantee shall spend a different average amount on program benefits for students enrolled in private schools if the average cost of meeting the needs

of those students is different from the average cost of meeting the needs of students enrolled in public schools.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 76.656 Information in an application for a subgrant.

An applicant for a subgrant shall include the following information in its application:

(a) A description of how the applicant will meet the Federal requirements for participation of students enrolled in private schools.

(b) The number of students enrolled in private schools who have been identified as eligible to benefits under the program.

(c) The number of students enrolled in private schools who will receive benefits under the program.

(d) The basis the applicant used to select the students.

(e) The manner and extent to which the applicant complied with § 76.652 (consultation).

(f) The places and times that the students will receive benefits under the program.

(g) The differences, if any, between the program benefits the applicant will provide to public and private school students, and the reasons for the differences.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 76.657 Separate classes prohibited.

A subgrantee may not use program funds for classes that are organized separately on the basis of school enrollment or religion of the students if:

(a) The classes are at the same site; and

(b) The classes include students enrolled in public schools and students enrolled in private schools.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 76.658 Funds not to benefit a private school.

(a) A subgrantee may not use program funds to finance the existing level of instruction in a private school or to otherwise benefit the private school.

(b) The subgrantee shall use program funds to meet the specific needs of students enrolled in private schools, rather than:

(1) The needs of a private school; or

(2) The general needs of the students enrolled in a private school.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 76.659 Use of public school personnel.

A subgrantee may use program funds to make public personnel available in other than public facilities:

(a) To the extent necessary to provide equitable program benefits designed for students enrolled in a private school; and

(b) If those benefits are not normally provided by the private school.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 76.660 Use of private school personnel.

A subgrantee may use program funds to pay for the services of an employee of a private school if:

(a) The employee performs the services outside of his or her regular hours of duty; and

(b) The employee performs the services under public supervision and control.

(Authority: 20 U.S.C. 1221e-3(a)(1))

Subpart A—General
PURPOSE, APPLICABILITY, AND GENERAL PROVISIONS REGULATIONS

§ 300.1 Purpose.

The purpose of this part is:

(a) To insure that all handicapped children have available to them a free appropriate public education which includes special education and related services to meet their unique needs,

(b) To insure that the rights of handicapped children and their parents are protected,

(c) To assist States and localities to provide for the education of all handicapped children, and

(d) To assess and insure the effectiveness of efforts to educate those children.

(Authority: 20 U.S.C. 1401 Note)

§ 300.2 Applicability to State, local and private agencies.

(a) *States.* This part applies to each State which receives payments under Part B of the Education of the Handicapped Act.

(b) *Public agencies within the State.* The annual program plan is submitted by the State education agency on behalf of the State as a whole. Therefore, the provisions of this part apply to all political subdivisions of the State that are involved in the education of handicapped children. These would include:

(1) The State educational agency,

(2) Local educational agencies and intermediate educational units,

(3) Other State agencies and schools (such as Departments of Mental Health and Welfare and State schools for the deaf or blind), and

(4) State correctional facilities.

(c) *Private schools and facilities.* Each public agency in the state is responsible for insuring that the rights and protections under this part are given to

children referred to or placed in private schools and facilities by that public agency.

(See §§ 300.400-300.403)

(Authority: 20 U.S.C. 1412(1), (6); 1413(a); 1413(a)(4)(B))

Comment. The requirements of this part are binding on each public agency that has direct or delegated authority to provide special education and related services in a State that receives funds under Part B of the Act, regardless of whether that agency is receiving funds under Part B.

§ 300.3. Regulations that apply to assistance to States for education of handicapped children.

(a) *Regulations.* The following regulations apply to this program of Assistance to States for Education of Handicapped Children.

(1) The Education Department General Administrative Regulations (EDGAR) in 34 CFR part 76 (State-Administered Programs), part 77 (Definitions that apply to Department Regulations), and part 79 (Intergovernmental Review of Department of Education Programs and Activities).

(2) The regulations in this part 300.

(b) *How to use regulations; how to apply for funds.* The "Introduction to Regulations of the Department" at the beginning of EDGAR includes general information to assist in—

(1) Using regulations that apply to Department programs; and

(2) Applying for assistance under a Department program.

(Authority: 20 U.S.C. 1221e-3(a)(1))

DEFINITIONS

Comment. Definitions of terms that are used throughout these regulations are included in this subpart. Other terms are defined in the specific subparts in which they are used. Below is a list of those terms and the specific sections and subparts in which they are defined:

Consent (§ 300.500 of subpart E)
Destruction (§ 300.560 of subpart E)
Direct services (§ 300.370(b)(1) of subpart C)
Evaluation (§ 300.500 of subpart E)
First priority children (§ 30.320(a) of subpart C)
Independent educational evaluation (§ 30.503 of subpart E)
Individualized education program (§ 300.340 of subpart C)
Participating agency (§ 300.560 of subpart E)
Personally identifiable (§ 30.500 of subpart E)
Private school handicapped children (§ 30.450 of subpart D)
Public expense (§ 300.503 of subpart E)
Second priority children (§ 300.320(b) of subpart C)
Special definition of "State" (§ 300.700 of subpart G)
Support services (§ 300.370(b)(2)of subpart C)

[42 FR 42476, Aug. 23, 1977, as amended at 45 FR 22531. Apr. 3, 1980. Redesignated at 45 FR 77368. Nov. 21, 1980; 55 FR 21714, May 25, 1990]

§ 300.4 Free appropriate public education.

As used in this part, the term *free appropriate public education* means special education and related services which:

(a) Are provided at public expense, under public supervision and direction, and without charge.

(b) Meet the standards of the State educational agency, including the requirements of this part,

(c) Include preschool, elementary school, or secondary school education in the State involved, and

(d) Are provided in conformity with an individualized education program which meets the requirements under §§ 300.340-300.349 of Subpart C.

(Authority: 20 U.S.C. 1401(18))

§ 300.5 Handicapped children.

(a) As used in this part, the term *handicapped children* means those children evaluated in accordance with §§ 300.530-300.534 as being mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, other health impaired, deaf-blind, multihandicapped, or as having specific learning disabilities, who because of those impairments need special education and related services.

(b) The terms used in this definition are defined as follows:

(1) *Deaf* means a hearing impairment which is so severe that the child is impaired in processing linguistic information through hearing, with or without amplification, which adversely affects educational performance.

(2) *Deaf-blind* means concomitant hearing and visual impairments, the combination of which causes such severe communication and other developmental and educational problems that they cannot be accommodated in special education programs solely for deaf or blind children.

(3) *Hard of Hearing* means a hearing impairment, whether permanent or fluctuating, which adversely affects a child's educational performance but which is not included under the definition of *deaf* in this section.

(4) *Mentally retarded* means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period, which adversely affects a child's educational performance.

(5) *Multihandicapped* means concomitant impairments (such as mentally retarded-blind, mentally retarded-orthopedically impaired, etc.), the combination of which causes such severe educational problems that they cannot be accommodated in special education programs solely for one of the impairments. The term does not include deaf-blind children.

(6) *Orthopedically impaired* means a severe orthopedic impairment which adversely affects a child's educational performance. The term includes impairments caused by congenital anomaly (e.g., clubfoot, absence of some member, etc.), impairments caused by disease (e.g. poliomyelitis, bone tuberculosis, etc.), and impairments from other causes (e.g., cerebral palsy, amputations, and fractures or burns which cause contractures).

(7) *Other health impaired* means (i) having an autistic condition which is manifested by severe communication and other developmental and educational problems; or (ii) having limited strength, vitality or alertness, due to chronic or acute health problems such as a heart condition, tuberculosis, rheumatic fever, nephritis, asthma, sickle cell anemia, hemophilia, epilepsy, lead poisoning, leukemia, or diabetes, which adversely affects a child's educational performance.

(8) *Seriously emotionally disturbed* is defined as follows:

(i) The term means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree, which adversely affects educational performance:

(A) An inability to learn which cannot be explained by intellectual, sensory, or health factors;

(B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers;

(C) Inappropriate types of behavior or feelings under normal circumstances;

(D) A general pervasive mood of unhappiness or depression; or

(E) A tendency to develop physical symptoms or fears associated with personal or school problems.

(ii) The term includes children who are schizophrenic. The term does not include children who are socially maladjusted, unless it is determined that they are seriously emotionally disturbed.

(9) *Specific learning disability* means a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which may manifest itself in an imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations. The term includes such conditions as perceptual handicaps, brain injury, minimal brain disfunction, dyslexia, and developmental aphasia. The term does not include children who have learning problems which are primarily the result of visual, hearing, or motor handicaps, of mental retardation of emotional disturbance or of environmental, cultural, or economic disadvantage.

(10) *Speech impaired* means a communication disorder such as stuttering, impaired articulation, a language impairment, or a voice impairment, which adversely affects a child's educational performance.

(11) *Visually handicapped* means a visual impairment which, even with correction, adversely affects a child's educational performance. The term includes both partially seeing and blind children.

(Authority: 20 U.S.C. 1401(1), (15))

[45 FR 42476, Aug. 23, 1977, as amended at 42 FR 65083, Dec. 29, 1977. Redesignated at 45 FR 77368, Nov. 21, 1980, and further amended at 46 FR 3866, Jan. 16, 1981]

§ 300.6 Include.

As used in this part, the term *include* means that the items named are not all of the possible items that are covered, whether like or unlike the ones named.

(Authority: 20 U.S.C. 1417(b))

§ 300.7 Intermediate educational unit.

As used in this part, the term *intermediate educational unit* means any public authority, other than a local educational agency, which:

(a) Is under the general supervision of a State educational agency;

(b) Is established by State law for the purpose of providing free public education on a regional basis; and

(c) Provides special education and related services to handicapped children within that State.

(Authority: 20 U.S.C. 1401 (22))

§ 300.8 Local educational agency.

(a) [Reserved]

(b) For the purposes of this part, the term *local educational agency* also includes intermediate educational units.

(Authority: 20 U.S.C. 1401 (8))

[42 FR 42476, Aug. 23, 1977, as amended at 45 FR 22531, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980]

§ 300.9 Native language.

As used in this part, the term *native language* has the meaning given that term by section 703(a)(2) of the Bilingual Education Act, which provides as follows:

The term *native language,* when used with reference to a person of limited English-speaking ability, means the language normally used by that person, or in the case of a child, the language normally used by the parents of the child.

(Authority: 20 U.S.C. 880b-1(a)(2); 1401(21))

Comment. Section 602(21) of the Education of the Handicapped Act states that the term *native language*

has the same meaning as the definition from the Bilingual Education Act. (The term is used in the prior notice and evaluation sections under § 300.505(b)(2) and § 300.532(a)(1) of Subpart E.) In using the term, the Act does not prevent the following means of communication:

(1) In all direct contact with a child (including evaluation of the child), communication would be in the language normally used by the child and not that of the parents, if there is a difference between the two.

(2) If a person is deaf or blind, or has no written language, the mode of communication would be that normally used by the person (such as sign language, braille, or oral communication).

§ 300.10 Parent.

As used in this part, the term *parent* means a parent, a guardian, a person acting as a parent of a child, or a surrogate parent who has been appointed in accordance with § 300.514. The term does not include the State if the child is a ward of the State.

(Authority: 20 U.S.C. 1415)

Comment: The term *parent* is defined to include persons acting in the place of a parent, such as a grandmother or stepparent with whom a child lives, as well as persons who are legally responsible for a child's welfare.

§ 300.11 Public agency.

As used in this part, the term *public agency* includes the State educational agency, local educational agencies, intermediate educational units, and any other political subdivision of the State which are responsible for providing education to handicapped children.

(Authority: 20 U.S.C. 1412(2)(B); 1412(6); 1413(a))

§ 300.12 Qualified.

As used in this part, the term *qualified* means that a person has met State educational agency approved or recognized certification, licensing, registration, or other comparable requirements which apply to the area in which he or she is providing special education or related services.

(Authority: 20 U.S.C. 1417(b))

§ 300.13 Related services.

(a) As used in this part, the term *related services* means transportation and such developmental, corrective, and other supportive services as are required to assist a handicapped child to benefit from special education, and includes speech pathology and audiology, psychological services, physical and occupational therapy, recreation, early identification and assessment of disabilities in children, counseling services, and medical services for diagnostic or evaluation purposes. The term also includes school health services, social work services in schools, and parent counseling and training.

(b) The terms used in this definition are defined as follows:

(1) *Audiology* includes:

(i) Identification of children with hearing loss;

(ii) Determination of the range, nature, and degree of hearing loss, including referral for medical or other professional attention for the habilitation of hearing;

(iii) Provision of habilitative activities, such as language habilitation, auditory training, speech reading (lip-reading), hearing evaluation, and speech conservation;

(iv) Creation and administration of programs for prevention of hearing loss;

(v) Counseling and guidance of pupils, parents, and teachers regarding hearing loss; and

(vi) Determination of the child's need for group and individual amplification, selecting and fitting an appropriate aid, and evaluating the effectiveness of amplification.

(2) *Counseling services* means services provided by qualified social workers, psychologists, guidance counselors, or other qualified personnel.

(3) *Early identification* means the implementation of a formal plan for identifying a disability as early as possible in a child's life.

(4) *Medical services* means services provided by a licensed physician to determine a child's medically related handicapping condition which results in the child's need for special education and related services.

(5) *Occupational therapy* includes:

(i) Improving, developing or restoring functions impaired or lost through illness, injury, or deprivation;

(ii) Improving ability to perform tasks for independent functioning when functions are impaired or lost; and

(iii) Preventing, through early intervention, initial or further impairment or loss of function.

(6) *Parent counseling and training* means assisting parents in understanding the special needs of their child and providing parents with information about child development.

(7) *Physical therapy* means services provided by a qualified physical therapist.

(8) *Psychological services* include:

(i) Administering psychological and educational tests, and other assessment procedures;

(ii) Interpreting assessment results;

(iii) Obtaining, integrating, and interpreting information about child behavior and conditions relating to learning.

(iv) Consulting with other staff members in planning school programs to meet the special needs of children as indicated by psychological tests, interviews, and behavioral evaluations; and

(v) Planning and managing a program of psychological services, including psychological counseling for children and parents.

(9) *Recreation* includes:

(i) Assessment of leisure function;

(ii) Therapeutic recreation services;

(iii) Recreation programs in schools and community agencies; and

(iv) Leisure education.

(10) *School health services* means services provided by a qualified school nurse or other qualified person.

(11) *Social work services in schools* include:

(i) Preparing a social or developmental history on a handicapped child;

(ii) Group and individual counseling with the child and family;

(iii) Working with those problems in a child's living situation (home, school, and community) that affect the child's adjustment in school; and

(iv) Mobilizing school and community resources to enable the child to receive maximum benefit from his or her educational program.

(12) *Speech pathology* includes:

(i) Identification of children with speech or language disorders;

(ii) Diagnosis and appraisal of specific speech or language disorders;

(iii) Referral for medical or other professional attention necessary for the habilitation of speech or language disorders;

(iv) Provisions of speech and language services for the habilitation or prevention of communicative disorders; and

(v) Counseling and guidance of parents, children, and teachers regarding speech and language disorders.

(13) *Transportation* includes:

(i) Travel to and from school and between schools,

(ii) Travel in and around school buildings, and

(iii) Specialized equipment (such as special or adapted buses, lifts, and ramps), if required to provide special transportation for a handicapped child.

(Authority: 20 U.S.C. 1401 (17))

Comment: With respect to related services, the Senate Report states:

The Committee bill provides a definition of ***related services,*** making clear that all such related services may not be required for each individual child and that such term includes early identification and assessment of handicapping conditions and the provision of services to minimize the effects of such conditions.

(Senate Report No. 94-168, p. 12 (1975))

The list of related services is not exhaustive and may include other developmental, corrective, or supportive services (such as artistic and cultural programs, and art, music, and dance therapy), if they are required to assist a handicapped child to benefit from special education.

There are certain kinds of services which might be provided by persons from varying professional backgrounds and with a variety of operational titles, depending upon requirements in individual States. For example, counseling services might be provided by social workers, psychologists, or guidance counselors; and psychological testing might be done by qualified psychological examiners, psychometrists, or psychologists, depending upon State standards.

Each related service defined under this part may include appropriate administrative and supervisory activities that are necessary for program planning, management, and evaluation.

§ 300.14 Special education.

(a) (1) As used in this part, the term *special education* means specially designed instruction, at no cost to the parent, to meet the unique needs of a handicapped child, including classroom instruction, instruction in

physical education, home instruction, and instruction in hospitals and institutions.

(2) The term includes speech pathology, or any other related service, if the service consists of specially designed instruction, at no cost to the parents, to meet the unique needs of a handicapped child, and is considered *special education* rather than a *related service* under State standards.

(3) The term also includes vocational education if it consists of specially designed instruction, at no cost to the parents, to meet the unique needs of a handicapped child.

(b) The terms in this definition are defined as follows:

(1) *At no cost* means that all specially designed instruction is provided without charge, but does not preclude incidental fees which are normally charged to non-handicapped students or their parents as a part of the regular education program.

(2) *Physical education* is defined as follow:

(1) The term means the development of:

(A) Physical and motor fitness;

(B) Fundamental motor skills and patterns; and

(C) Skills in aquatics, dance, and individual and group games and sports (including intramural and lifetime sports).

(ii) The term includes special physical education, adapted physical education, movement education, and motor development.

(Authority: 20 U.S.C. 1401 (16))

(3) *Vocational education* means organized educational programs which are directly related to the preparation of individuals for paid or unpaid employment, or for additional preparation for a career requiring other than a baccalaureate or advanced degree.

(Authority: 20 U.S.C. 1401 (16))

Comment. (1) The definition of *special education* is a particularly important one under these regulations, since a child is not handicapped unless he or she needs special education. (See the definition of *handicapped children* in § 300.5.) The definition of *related services* (§300.13) also depends on this definition, since a related service must be necessary for a child to benefit from special education. Therefore, if a child does not need special education, there can be no *related services,* and the child (because not *handicapped)* is not covered under the Act.

(2) The above definition of vocational education is taken from the Vocational Education Act of 1963, as amended by Pub. L. 94-482. Under that Act, *vocational education* includes industrial arts and consumer and homemaking education programs.

Subpart B – State Annual Program Plans and Local Applications

ANNUAL PROGRAM PLANS – GENERAL

§ 300.110 Conditions of assistance.

In order to receive funds under Part B of the Act for any fiscal year, a State must submit an annual program plan to the Secretary through its State educational agency.

(Authority: 20 U.S.C. 1232c(b), 1412, 1413)

§ 300.111 Contents of plan

Each annual program plan must contain the provisions required in this subpart.

(Authority: 20 U.S.C. 1412, 1413, 1232c(b))

§ 300.121 Right to a free appropriate public education.

(a) Each annual program plan must include information which shows that the State has in effect a policy which insures that all handicapped children have the right to a free appropriate public education within the age ranges and timelines under § 300.122.

(b) The information must include a copy of each State statute, court order, State Attorney General opinion, and other State document that shows the source of the policy.

(c) The information must show that the policy:

(1) Applies to all public agencies in the State;

(2) Applies to all handicapped children;

(3) Implements the priorities established under § 300.127(a)(1) of this subpart; and

(4) Establishes timeliness for implementing the policy, in accordance with § 300.122.

(Approved by the Office of Management and Budget under control number 1820-0030).

(Authority: 20 U.S.C. 1412(1)(2)(B), (6); 1413(a)(3))

[42 FR 42476, Aug. 23, 1977. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 53 FR 49144, Dec. 6, 1988]

§ 300.122 Timeliness and ages for free appropriate public education.

(a) *General.* Each annual program plan must include in detail the policies and procedures which the State will undertake or has undertaken in order to insure that a free appropriate public education is available for all handicapped children aged three through eighteen within the State not later than September 1, 1978, and for all handicapped children aged three through twenty-one within the State not later than September 1, 1980.

(b) *Documents relating to timeliness.* Each annual program plan must include a copy of each statute, court order, attorney general decision, an other State document which demonstrates that the State has established timelines in accordance with paragraph (a) of this section.

(c) *Exception.* The requirement in paragraph (a) of this section does not apply to a State with respect to handicapped children aged three, four, five, eighteen, nineteen, twenty, or twenty-one to the extent that the requirement would be inconsistent with State law or practice, or the order of any court, respecting public education for one or more of those age groups in the State.

(d) *Documents relating to exceptions.* Each annual program plan must:

(1) Describe in detail the extent to which the exception in paragraph (c) of this section applies to the State, and

(2) Include a copy of each State law, court order, and other document which provides a basis for the exception.

(Approved by the Office of Management and Budget under control number 1820-0030)

(Authority: 20 U.S.C. 1412(2)(B))

[42 FR 42476, Aug. 23, 1977. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 53 FR 49144, Dec. 6, 1988]

§ 300.123 Full educational opportunity goal.

Each annual program plan must include in detail the policies and procedures which the State will undertake, or has undertaken, in order to insure that the State has a goal of providing full educational opportunity to all handicapped children aged birth through twenty-one.

(Approved by the Office of Management and Budget under control number 1820-0030)

(Authority: 20 U.S.C. 1412(2)(A))

[42 FR 42476, Aug. 23, 1977. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 53 FR 49144, Dec. 6, 1988]

§ 300.124 Full educational opportunity goal—data requirement.

Beginning with school year 1978-1979, each annual program plan must contain the following information:

(a) The estimated number of handicapped children who need special education and related services.

(b) For the current school year:

(1) The number of handicapped children aged birth through two, who are receiving special education and related services; and

(2) The number of handicapped children:

(i) Who are receiving a free appropriate public education,

(ii) Who need, but are not receiving a free appropriate public education,

(iii) Who are enrolled in public private institutions who are receiving a free appropriate public education, and

(iv) Who are enrolled in public and private institutions and are not receiving a free appropriate public education.

(c) The estimated numbers of handicapped children who are expected to receive special education and related services during the next school year.

(d) A description of the basis used to determine the data required under this section.–

(e) The data required by paragraphs (a), (b), and (c) of this section must be provided:

(1) For each disability category (except for children aged birth through two), and

(2) For each of the following age ranges: birth through two, three through five, six through seventeen, and eighteen through twenty-one.

(Authority: 20 U.S.C 1412(2)(A))

Comment: In Part B of the Act, the term *disability* is used interchangeably with *handicapping condition*. For consistency in this regulation, a child with a *disability* means a child with one of the impairments listed in the definition of *handicapped children* in § 300.5, if the child needs special education because of the impairment. In essence, there is a continuum of impairments. When an impairment is of such nature that the child needs special education, it is referred to as a disability, in these regulations, and the child is a *handicapped* child.

States should note that data required under this section are not to be transmitted to the Secretary in personally identifiable form. Generally, except for such purposes as monitoring and auditing, neither the States nor the Federal Government should have to collect data under this part in personally identifiable form.

(Approved by the Office of Management and Budget under control number 1820-0030)

[42 FR 42476, Aug. 23, 1977. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 53 FR 49144, Dec. 6 1988]

§ 300.125 Full educational opportunity goal—timetable.

(a) *General requirement.* Each annual program plan must contain a detailed timetable for accomplishing the goal of providing full educational opportunity for all handicapped children.

(b) *Content of timetable.* (1) The timetable must indicate what percent of the total estimated number of handicapped children the State expects to have full educational opportunity in each succeeding school year.

(2) The data required under this paragraph must be provided:

(i) For each disability category (except for children aged birth through two), and

(ii) For each of the following age ranges; birth through two, three through five, six through seventeen, and eighteen through twnety-one.

(Approved by the Office of Management and Budget under control number 1820-0030)

(Authority: 20 U.S.C. 1412(2)(A))

[42 FR 42476, Aug. 23, 1977. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 53 FR 49144, Dec. 6, 1988]

§ 300.126 Full educational opportunity goal—facilities, personnel, and services.

(a) *General Requirement.* Each annual program plan must include a description of the kind and number of facilities, personnel, and services necessary throughout the State to meet the goal of providing full educational opportunity for all handicapped children. The State educational agency shall include the data required under paragraph (b) of this section and whatever additional data are necessary to meet the requirement.

(b) *Statistical description.* Each annual program plan must include the following data:

(1) The number of additional special class teachers, resource room teachers, and intinerant or consultant teachers needed for each disability category and the number of each of these who are currently employed in the State.

(2) The number of other additional personnel needed, and the number currently employed in the State, including school psychologists, school social workers, occupational therapists, physical therapists, home-hospital teachers, speech-language pathologists, audiologists, teacher aides, vocational education teachers, work study coordinators, physical education teachers, therapeutic recreation specialists, diagnostic personnel, supervisors, and other instructional and non-instructional staff.

(3) The total number of personnel reported under paragraphs (b) (1) and (2) of this section, and the salary costs of those personnel.

(4) The number and kind of facilities needed for handicapped children and the number and kind currently in use in the State, including regular classes serving handicapped children, self-contained classes on a regular school campus, resource rooms, private special education day schools, public special education day schools, private special education residential schools, public special education residential schools, hospital programs, occupational therapy facilities, physical therapy facilities, public sheltered workshops, private sheltered workshops, and other types of facilities.

(5) The total number of transportation units needed for handicapped children, the number of transportation units designed for handicapped children which are in use in the State, and the number of handicapped children who use these units to benefit from special education.

(c) *Data categories.* The data required under paragraph (b) of this section must be provided as follows:

(1) Estimates for serving all handicapped children who require special education and related services,

(2) Current year data, based on the actual numbers of handicapped children receiving special education and related services (as reported under Subpart G), and

(3) Estimates for the next school year.

(d) *Rationale.* Each annual program plan must include a description of the means used to determine the number and salary costs of personnel.

(Approved by the Office of Management and Budget under control number 1820-0030)

(Authority: 20 U.S.C. 1412(2)(A))

[42 FR 42476, Aug. 23, 1977. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 53 FR 49144, Dec. 6, 1988]

§ 300.127 **Priorities.**

(a) *General requirement.* Each annual program plan must include information which shows that:

(1) The State has established priorities which meet the requirements under §§ 300.320-300.324 of Subpart C.

(2) The State priorities meet the timelines under § 300.122 of this subpart, and

(3) The State has made progress in meeting those timelines.

(b) *Child data.* (1) Each annual program plan must show the number of handicapped children known by the State to be in each of the first two priority groups named in § 300.321 of Subpart C:

(i) By disability category, and

(ii) By the age ranges in § 300.124(e)(2) of this subpart.

(c) *Activities and resources.* Each annual program plan must show for each of the first two priority groups:

(1) The programs, services, and activities that are being carried out in the State,

(2) The Federal, State, and local resources that have been committed during the current school year, and

(3) The programs, services, activities and resources that are to be provided during the next school year.

(Approved by the Office of Management and Budget under control number 1820-0030)

(Authority: 20 U.S.C. 1412(3))

[42 FR 42476, Aug. 23, 1977. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 53 FR 49144, Dec. 6, 1988]

§ 30.128 **Identification, location, and evaluation of handicapped children.**

(a) *General requirement.* Each annual program plan must include in detail the policies and procedures which the State will undertake or has undertaken to insure that:

(1) All children who are handicapped, regardless of the severity of their handicap, and who are in need of special education and related services are identified, located, and evaluated; and

(2) A practical method is developed and implemented to determine which children are currently receiving needed special education and related services and which children are not currently receiving needed special education and related services.

(b) *Information.* Each annual program plan must:

(1) Designate the State agency (if other than State educational agency) responsible for coordinating the planning and implementation of the policies and procedures under paragraph (a) of this section;

(2) Name each agency that participates in the planning and implementation and describe the nature and extent of its participation;

(3) Describe the extent to which:

(i) The activities described in paragraph (a) of this section have been achieved under the current annual program plan, and

(ii) The resources named for these activities in that plan have been used;

(4) Describe each type of activity to be carried out during the next school year, including the role of the agency named under paragraph (b)(1) of this section, timelines for completing those activities, resources that will be used, and expected outcomes;

(5) Describe how the policies and procedures under paragraph (a) of this section will be monitored to insure that the State educational agency obtains:

(i) The number of handicapped children within each disability category that have been identified, located, and evaluated, and

(ii) Information adequate to evaluate the effectiveness of those policies and procedures; and

(6) Describe the method the State uses to determine which children are currently receiving special education and related services and which children are not receiving special education and related services.

(Authority: 20 U.S.C. 1412(2)(C))

Comment. The State is responsible for insuring that all handicapped children are identified, located and evaluated, including children in all public and private agencies and institutions in the State. Collection and use of data are subject to the confidentiality requirements in §§ 300.560-300.576.

(Approved by the Office of Management and Budget under control number 1820-0030)

[42 FR 42476, Aug. 23, 1977. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 53 FR 49144, Dec. 6, 1988]

§ 300.129 Confidentiality of personally identifiable information.

(a) Each annual program plan must include in detail the policies and procedures which the State will undertake or has undertaken in order to insure the protection of the confidentiality of any personally identifiable information collected, used, or maintained under this part.

(b) The Secretary shall use the criteria in §§ 300.560-300.576 of Subpart E to evaluate the policies and procedures of the State under paragraph (a) of this section.

(Authority: 20 U.S.C. 1412(2)(D); 1417(c))

Comment. The confidentiality regulations were published in the FEDERAL REGISTER in final form on February 27, 1976 (41 FR 8603-8610), and met the

requirements of Part B of the Act, as amended by Pub. L. 94-142. Those regulations are incorporated in §§ 300.560-300.576 of Subpart E.

(Approved by the Office of Management and Budget under control number 1820-0030)

[42 FR 42476, Aug. 23, 1977. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 53 FR 49144, Dec. 6, 1988]

§ 300.130 Individualized education programs.

(a) Each annual program plan must include information which shows that each public agency in the State maintains records of the individualized education program for each handicapped child, and each public agency establishes, reviews, and revises each program as provided in Subpart C.

(b) Each annual program plan must include:

(1) a copy of each State statute, policy, and standard that regulates the manner in which individualized education programs are developed, implemented, reviewed, and revised and

(2) the procedures which the State educational agency follows in monitoring and evaluating those programs.

(Approved by the Office of Management and Budget under control number 1820-0030)

(Authority: 20 U.S.C. 1412(4))

[42 FR 42476, Aug. 23, 1977. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 53 FR 49144, Dec. 6, 1988]

§ 300.131 Procedural safeguards.

Each annual program plan must include procedural safeguards which insure that the requirements in §§ 300.500-300.514 of Subpart E are met.

(Approved by the Office of Management and Budget under control number 1820-0030)

(Authority: 20 U.S.C. 1412(5)(A))

[42 FR 42476, Aug. 23, 1977. Redesignated at 45 FR 77368, Nov 21, 1980, and amended at 53 FR 49144, Dec. 6, 1988]

§ 300.132 Least restrictive environment.

(a) Each annual program plan must include procedures which insure that the requirements in §§ 300.550-300.556 of Subpart E are met.

(b) Each annual program plan must include the following information:

(1) The number of handicapped children in the State, within each disability category, who are participating in regular education programs, consistent with §§ 300.550-300.556 of Subpart E.

(2) The number of handicapped children who are in separate classes or separate school facilities, or who are otherwise removed from the regular education environment.

(Approved by the Office of Management and Budget under control number 1820-0030)

(Authority: 20 U.S.C. 1412(5)(B))

[42 FR 42476, Aug. 23, 1977. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 53 FR 49144, Dec. 6, 1988]

INDIVIDUALIZED EDUCATION PROGRAMS

§ 300.340 Definition.

As used in this part, the term *individualized education program* means a written statement for a handicapped child that is developed and implemented in accordance with §§ 300.341-300.349.

(Authority: 20 U.S.C. 1401(19))

§ 300.341 State educational agency responsibility.

(a) *Public agencies.* The State educational agency shall insure that each public agency develops and implements an individualized education program for each of its handicapped children.

(b) *Private schools and facilities.* The State educational agency shall insure that an individualized education program is developed and implemented for each handicapped child who:

(1) Is placed in or referred to a private school or facility by a public agency; or

(2) Is enrolled in a parochial or other private school and receives special education or related services from a public agency.

(Authority: 20 U.S.C. 1412 (4), (6); 1413(a)(4))

Comment: This section applies to all public agencies, including other State agencies (e.g., departments of mental health and welfare), which provide special education to a handicapped child either directly, by contract or through other arrangements. Thus, if a State welfare agency contracts with a private school or facility to provide special education to a handicapped child, that agency would be responsible for insuring that an individualized education program is developed for the child.

§ 300.342 When individualized education programs must be in effect.

(a) On October 1, 1977, and at the beginning of each school year thereafter, each public agency shall have in effect an individualized education program for every handicapped child who is receiving special education from that agency.

(b) An individualized education program must:

(1) Be in effect before special education and related services are provided to a child; and

(2) Be implemented as soon as possible following the meetings under § 300.343.

(Authority: 20 U.S.C. 1412 (2)(B), (4), (6); 1414(a)(5); Pub. L. 94-142, Sec. 8(c)(1975))

Comment. Under paragraph (b)(2), it is expected that a handicapped child's individualized education program (IEP) will be implemented immediately following the meetings under § 300.343. An exception to this would be (1) when the meetings occur during the summer or a vacation period, or (2) where there are circumstances which require a short delay (e.g., working out transportation arrangements). However, there can be no undue delay in providing special education and related services to the child.

§ 300.343 Meetings.

(a) *General.* Each public agency is responsible for initiating and conducting meetings for the purpose of developing, reviewing, and revising a handicapped child's individualized education program.

(b) *Handicapped children currently served.* If the public agency has determined that a handicapped child will receive special education during school year 1977-1978, a meeting must be held early enough to insure that an individualized education program is developed by October 1, 1977.

(c) *Other handicapped children.* For a handicapped child who is not included under paragraph (b) of this action, a meeting must be held within thirty calendar days of a determination that the child needs special education and related services.

(d) *Review.* Each public agency shall initiate and conduct meetings to periodically review each child's individualized education program and if appropriate revise its provisions. A meeting must be held for this purpose at least once a year.

(Authority: 20 U.S.C. 1412(2)(B), (4), (6); 1414(a)(5))

Comment. The dates on which agencies must have individualized education programs (IEPs) in effect are specified in § 300.342 (October 1, 1977, and the beginning of each school year thereafter). However, except for new handicapped children (i.e., those evaluated and determined to need special education after October 1, 1977, the timing of meetings to develop, review, and revise IEPs is left to the discretion of each agency.

In order to have IEPs in effect by the dates in § 300.342, agencies could hold meetings at the end of the school year or during the summer preceding those dates. In meeting the October 1, 1977 timeline, meetings could be conducted up through the October 1 date. Thereafter, meetings may be held any time throughout the year, as long as IEPs are in effect at the beginning of each school year.

The statute requires agencies to hold a meeting at least once each year in order to review, and if appropriate revise, each child's IEP. The timing of those meetings could be on the anniversary date of the last IEP meeting on the child, but this is left to the discretion of the agency.

§ 300.344 Participation in meetings.

(a) *General.* The public agency shall insure that each meeting includes the following participants:

(1) A representative of the public agency, other than the child's teacher, who is qualified to provide, or supervise the provision of, special education.

(2) The child's teacher.

(3) One or both of the child's parents, subject to § 300.345.

(4) The child, where appropriate.

(5) Other individuals at the discretion of the parent or agency.

(b) *Evaluation personnel.* For a handicapped child who has been evaluated for the first time, the public agency shall insure:

(1) That a member of the evaluation team participates in the meeting; or

(2) That the representative of the public agency, the child's teacher, or some other person is present at the

meeting, who is knowledgeable about the evaluation procedures used with the child and is familiar with the results of the evaluation.

Authority: 20 U.S.C. 140(19); 1412 (2)(B), (4), (6); 1414(a)(5))

Comment. 1. In deciding which teacher will participate in meetings on a child's individualized education program, the agency may wish to consider the following possibilities:

(a) For a handicapped child who is receiving special education, the *teacher* could be the child's special education teacher. If the child's handicap is a speech impairment, the *teacher* could be the speech-language pathologist.

(b) For a handicapped child who is being considered for placement in special education, the *teacher* could be the child's regular teacher, or a teacher qualified to provide education in the type of program in which the child may be placed, or both.

(c) If the child is not in school or has more than one teacher, the agency may designate which teacher will participate in the meeting.

2. Either the teacher or the agency representative should be qualified in the area of the child's suspected disability.

3. For a child whose primary handicap is a speech impairment, the evaluation personnel participating under paragraph (b)(1) of this section would normally be the speech-language pathologist.

§ 300.345 Parent participation.

(a) Each public agency shall take steps to insure that one or both of the parents of the handicapped child are present at each meeting or are afforded the opportunity to participate, including:

(1) Notifying parents of the meeting early enough to insure that they will have an opportunity to attend; and

(2) Scheduling the meeting at a mutually agreed on time and place.

(b) The notice under paragraph (a)(1) of this section must indicate the purpose, time, and location of the meeting, and who will be in attendance.

(c) If neither parent can attend, the public agency shall use other methods to insure parent participation, including individual or conference telephone calls.

(d) A meeting may be conducted without a parent in attendance if the public agency is unable to convince the parents that they should attend. In this case the public agency must have a record of its attempts to arrange a mutually agreed on time and place such as:

(12) Detailed records of telephone calls made or attempted and the results of those calls.

(2) Copies of correspondence sent to the parents and any responses received, and

(3) Detailed records of visits made to the parent's home or place of employment and the results of those visits.

(e) The public agency shall take whatever action is necessary to insure that the parent understands the proceedings at a meeting, including arranging for an interpreter for parents who are deaf or whose native language is other than English.

(f) The public agency shall give the parent, on request, a copy of the individualized education program.

(Authority: 20 U.S.C. 1401(19); 1412 (2)(B), (4), (6); 1414(a)(5))

Comment. The notice in paragraph (a) could also inform parents that they may bring other people to the meeting. As indicated in paragraph (c), the procedure used to notify parents (whether oral or written or both) is left to the discretion of the agency, but the agency must keep a record of its efforts to contact parents.

§ 300.346 Content of individualized education program.

The individualized education program for each child must include:

(a) A statement of the child's present levels of educational performance;

(b) A statement of annual goals, including short term instructional objectives;

(c) A statement of the specific special education and related services to be provided to the child, and the extent to which the child will be able to participate in regular educational programs;

(d) The proposed dates for initiation of services and the anticipated duration of the services; and

(e) Appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether the short term instructional objectives are being achieved.

(Authority: 20 U.S.C. 1401(19); 1412 (2)(B), (4), (6); 1414(a)(5); Senate Report No 94-168, p. 11 (1975))

§ 300.347 Private school placements.

(a) *Developing individualized education programs.* (1) Before a public agency places a handicapped child in, or refers a child to, a private school or facility, the agency shall initiate and conduct a meeting to develop an individualized education program for the child in accordance with § 300.343.

(2) The agency shall insure that a representative of the private school facility attends the meeting. If the repesentative cannot attend, the agency shall use other methods to insure participation by the private school or facility, including individual or conference telephone calls.

(3) The public agency shall also develop an individualized educational program for each handicapped child who was placed in a private school or facility by the agency before the effective date of these regulations.

(b) *Reviewing and revising individualized education programs.* (1) After a handicapped child enters a private school or facility, any meetings to review and revise the child's individualized education program may

be initiated and conducted by the private school or facility at the discretion of the public agency.

(2) If the private school or facility initiates and conducts these meetings, the public agency shall insure that the parents and an agency representative:

(i) Are involved in any decision about the child's individualized education program; and

(ii) Agree to any proposed changes in the program before these changes are implemented.

(c) *Responsibility.* Even if a private school or facility implements a child's individualized education program, responsibility for compliance with this part remains with the public agency and the State educational agency.

(Authority: 20 U.S.C. 1413(a)(4)(B))

§ 300.348 Handicapped children in parochial or other private schools.

If a handicapped child is enrolled in a parochial or other private school and receives special education or related services form a public agency, the public agency shall:

(a) Initiate and conduct meetings to develop, review and revise an individualized education program for the child, in accordance with § 300.343; and

(b) Insure that representative of the parochial or other private school attends each meeting. If the representative cannot attend, the agency shall use other methods to insure participation by the private school, including individual or conference telephone calls.

(Authority: 20 U.S.C. 1413(a)(4)A))

Subpart D—Private Schools

§ 300.401 Responsibility of State educational agency.

Each State educational agency shall insure that a handicapped child who is placed in or referred to a private school or facility by a public agency:

(a) Is provided special education and related services:

(1) In conformance with an individualized education program which meets the requirements under §§ 300.340-300.349 of subpart C;

(2) At no cost to the parents; and

(3) At a school or facility which meets the standards that apply to State and local educational agencies (including the requirements in this part) and;

(b) Has all of the rights of a handicapped child who is served by a public agency.

(Authority: 20 U.S.C. 1413(a)(4)(B))

§ 300.402 Implementation by State educational agency.

In implementing § 300.401, the State educational agency shall:

(a) Monitor compliance through procedures such as written reports, on-site visits, and parent questionaires;

(b) Disseminate copies of applicable standards to each private school and facility to which a public agency has referred or placed a handicapped child; and

(c) Provide an opportunity for those private schools and facilities to participate in the development and revision of State standards which apply to them.

(Authority: 20 U.S.C. 1413(a)(4)(B))

§ 300.403 Placement of children by parents.

(a) If a handicapped child has available a free appropriate public education and the parents choose to place the child in a private school or facility, the public agency is not required by this part to pay for the child's education at the private school or facility. However, the public agency shall make services available to the child as provided under §§ 300.450-300.460.

(b) Disagreements between a parent and a public agency regarding the availability of a program appropriate for the child, and the question of financial responsi-

bility, are subject to the due process procedures under §§ 300.500-300.514 of subpart E.

(Authority: 20 U.S.C. 1412(2)(B); 1515)

HANDICAPPED CHILDREN IN PRIVATE SCHOOLS NOT PLACED OR REFERRED BY PUBLIC AGENCIES

§ 300.450 Definition of *private school handicapped children.*

As used in this part, *private school handicapped children* means handicapped children enrolled in private schools or facilities other than handicapped children covered under §§ 300.400-300.402.

(Authority: 20 U.S.C. 1413(a)(4)(A))

[49 FR 48526, Dec. 12 1984]

§ 300.451 State educational agency responsibility.

The State educational agency shall insure that –

(a) To the extent consistent with their number and location in the State, provision is made for the participation of private school handicapped children in the program assisted or carried out under this part by providing them with special education and related services; and

(b) The requiremmets in 34 CFR 76.651-76.663 of EDGAR are met.

(Authority: 20 U.S.C. 1413(a)(4)(A))

[45 FR 22531, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980]

§ 300.452 Local educational agency responsibility.

(a) Each local educational agency shall provide special education and related services designed to meet the needs of private school handicapped children residing in the jurisdiction of the agency.

(Authority: Sec. 1413(a)(4)(A); 1414(a)(6))

[42 FR 42476, Aug. 23, 1977, as amended at 45 FR 22531, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980]

APPENDIX F

(From Art. 4, Arizona Revised Statutes)

§ 15-756. Powers and duties of superintendent of public instruction

The superintendent of public instruction shall:

1. Enforce the compliance of school districts with the requirements of this article and report to the state board of education those districts which appear to be in noncompliance.

2. Monitor and review all requirements for fiscal and programmatic reporting of bilingual programs and English as a second language programs.

3. Prescribe the procedures for self-assessment as prescribed in § 15-755.

4. Present a summary of the reports specified in § 15-755 and the superintendent's recommendations to the legislature in January of each year.

5. Prescribe the method of counting limited English proficient pupils enrolled in a program to promote English proficiency for the group B weight as prescribed in § 15-943. This method shall require that pupils in kindergarten programs be counted as full-time students.

Amended by Laws 1989, Ch. 273, § 8, eff. June 26, 1989.

ARTICLE 4. SPECIAL EDUCATION FOR EXCEPTIONAL CHILDREN

Administrative Code References

Preschool programs, see A.C.R.R. R7-2-401.

§ 15-761. Definitions

In this article, unless the context otherwise requires:

1. "Educable mentally handicapped" means a child who because of his intellectual development, as determined by evaluation pursuant to § 15-766, is incapable

of being educated effectively through regular classroom instruction without the support of special classes or special services designed to promote his educational development.

2. "Educational disadvantage" means a nonhandicapping condition which has limited a child's opportunity for educational experience resulting in a nonhandicapped child achieving less than a normal level of learning development.

3. "Exceptional child" means a gifted child or a handicapped child.

4. "Gifted child" means a child of lawful school age who due to superior intellect or advanced learning ability, or both, is not afforded an opportunity for otherwise attainable progress and development in regular classroom instruction and who needs special instruction or special ancillary services, or both, to achieve at levels commensurate with his intellect and ability.

5. "Handicapped child" means a child of lawful school age who due to present physical, mental or emotional characteristics or a combination of such characteristics is not afforded the opportunity for all-around adjustment and progress in regular classroom instruction and who needs special instruction or special ancillary services, or both, to achieve at levels commensurate with his abilities. Handicapped child includes educable mentally handicapped, hearing handicapped, other health impaired, learning disabled, multiple handicapped, multiple handicapped with severe sensory impairment, physically handicapped, seriously emotionally handicapped, severely or profoundly mentally handicapped, speech handicapped, trainable mentally handicapped and visually handicapped.

6. "Hearing handicapped" means a child who has a hearing deviation from the normal, as determined by evaluation pursuant to § 15-766, which impedes his educational progress in the regular classroom situation without the support of special classes or special services designed to promote his educational development, and

whose intellectual development is such that he is capable of being educated through a modified instructional environment.

7. "Learning disabled" means a child who a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which may manifest itself in an imperfect ability to listen, think, speak, read, write, spell or do mathematical calculations. The term includes such conditions as perceptual handicaps, brain injury, minimal brain dysfunction, dyslexia and developmental aphasia. The term does not include children who have learning problems which are primarily the result of visual, hearing or motor handicaps, of mental retardation, of emotional disturbance or of environmental, cultural or economic disadvantage.

8. "Multiple handicapped" means a child who has serious learning and developmental problems resulting from multiple handicapping conditions as determined by evaluation pursuant to § 15-766, and who cannot be provided for adequately in a program designed to meet the needs of any one handicapping condition. The multiple handicapped includes a child who is any of the following:

(a) Autistic.

(b) Severely or profoundly mentally handicapped.

(c) Handicapped with two or more of the following conditions:

(i) Hearing handicapped.

(ii) Physically handicapped.

(iii) Trainable mentally handicapped.

(iv) Visually handicapped.

(d) Handicapped with one of the handicapping conditions listed in subdivision (c) of this paragraph existing concurrently with a condition of educable mentally handicapped, seriously emotionally handicapped or learning disabled.

9. "Multiple handicapped with severe sensory impairment" means a child who is multiple handicapped and whose handicapping conditions include at least one of the following:

(a) Severely visually handicapped or severely hearing handicapped in combination with another severe handicap.

(b) Severely visually handicapped and severely hearing handicapped.

10. "Other health impaired" means a child who has limited strength, vitality or alertness due to chronic or acute health problems which adversely affect a pupil's educational performance.

11. "Physically handicapped" means a child who has a physical handicap or disability, as determined by evaluation pursuant to § 15-766, which impedes his educational progress in the regular classroom situation without the support of special classes or special services designed to promote his educational development, and whose intellectual development is such that he is capable of being educated through a modified instructional environment.

12. "Seriously emotionally handicapped" means a child who because of serious social or behavioral problems, as determined by evaluation pursuant to § 15-766, is unable or incapable of meeting the demands of regular classroom programs in the schools and in the opinion of diagnostic and instructional personnel the child requires special classes or special services designed to promote his educational and emotional growth and development.

13. "Severely or profoundly mentally handicapped" means a child who because of the severity of pervasive deficits in intellectual development, as determined by evaluation pursuant to § 15-766, requires additional educational and related services beyond those provided in regular classroom programs, educable mentally handicapped programs or trainable mentally handicapped programs.

14. "Special education" means the adjustment of the environmental factors, modification of the course of study and adaptation of teaching methods, materials and techniques to provide educationally for those children who are gifted or handicapped to such an extent that they do not profit from the regular course of study or need special education services in order to profit. Difficulty in writing, speaking or understanding the English language due to an environmental background wherein a language other than English is spoken primarily or exclusively shall not be considered a sufficient handicap to require special education.

15. "Speech or language handicapped" means a child who has a communication disorder such as stuttering, impaired articulation, severe disorders of syntax, semantics or vocabulary or a voice impairment, as determined by evaluation pursuant to § 15-766, to the extent that it calls attention to itself, interferes with communication or causes the child to be maladjusted.

16. "Trainable mentally handicapped" means a child who because of his intellectual development, as determined by evaluation pursuant to § 15-766, is incapable of being educated in regular classroom programs or educable mentally handicapped programs without the support of special classes or special services designed to promote his educational development.

17. "Visually handicapped" means a child who has a vision deviation from the normal, as determined by evaluation pursuant to § 15-766, which impedes his educational progress in the regular classroom situation without the support of special classes or special services designed to promote his educational development, and whose intellectual development is such that he is capable of being educated through a modified instructional environment.

Amended by Laws 1986, Ch. 298, § 1, eff. May 5, 1986; Laws 1987, Ch. 363, § 1, eff. May 22, 1987; Laws 1988, Ch. 281, § 1; Laws 1989, Ch. 15, § 2.

Historical Note

Laws 1986, Ch. 298, § 4, effective May 6, 1986, provides:

"Sec. 4. Budget for fiscal year 1986-1987

"Governing boards of school districts shall budget for fiscal year 1986-1987 using the provisions of § 15-761, Arizona Revised Statutes, as amended by this act."

Laws 1987, Ch. 363, § 27, effective May 22, 1987, provides:

"Sec. 27. Budgeting for MHSSI pupils beginning with fiscal year 1988-1989

"Notwithstanding §§ 15-761, 15-901 and 15-943, Arizona Revised Statutes, as amended by this act, school district governing boards may enroll pupils in a multiple handicapped with severe sensory impairment program beginning with fiscal year 1987-1988, but no pupils may be budgeted in that category until the 1988-1989 budget year."

Laws 1988, Ch. 281 § 11 provides:

"Sec. 11. Budgeting for preschool handicapped pupils beginning with fiscal year 1989-1990.

"Notwithstanding §§ 15-761, 15-901, 15-943, 15-961, 15-962 and 15-971, Arizona Revised Statutes, as amended by this act, school district governing boards may budget for preschool handicapped pupils beginning with fiscal year 1989-1990 as provided in this act."

Cross References

Juvenile offenders, educational rehabilitation, see § 8-301.

Preschool programs for handicapped children, see § 15-771.

Notes of Decisions

1. Handicapped child

Educational placement decisions relating to handicapped children must initially be made by the local school district in which the child resides and preliminary placement decision must be reviewed by school district individualized education program team if child's parents request review. Op.Atty.Gen. No. I85-014.

In case of child who is developmentally disabled as defined by § 36-551, Department of Economic Security and local district must coordinate in development of the child's individualized education program if residential placement is recommended by the district, and the district must ensure that representative of private school facility or facilities being considered attend or participate in developing the program. Op.Att.Gen. No. I85-014.

§ 15-764. Powers of the governing board of a school district or the county school superintendent

A. The governing board of each school district or the county school superintendent shall:

1. Provide special education and required supportive services for all handicapped children.

2. Employ supportive special personnel, which may include a director of special education, for the operation of special school programs and services for exceptional children.

3. To the extent practicable, educate handicapped children in the regular education classes. Special classes, separate schooling or other removal of handicapped children from the regular educational environment shall occur only if, and to the extent that, the nature or severity of the handicap is such that education in regular classes, even with the use of supplementary aids and services, cannot be accomplished satisfactorily.

4. Provide necessary transportation for handicapped children in connection with any program, class

or service.

5. Establish policy with regard to allowable pupil-teacher ratios and pupil-staff ratios within the school district or county for provision of special education services.

B. The special education programs and services established pursuant to this section and § 15-765 shall be conducted only in a school facility which houses regular education classes or in other facilities approved by the division of special education.

C. The governing board of each school district shall provide special education to gifted pupils identified as provided in § 15-770. Special education for gifted pupils shall only include expanding academic course offerings and supplemental services as may be required to provide an educational program which is commensurate with the academic abilities and potentials of the gifted pupil.

D. The governing board may modify the course of study and adapt teaching methods, materials and techniques to provide educationally for those pupils who are gifted and possess superior intellect or advanced learning ability, or both, but may have an educational disadvantage resulting from a handicapping condition or a difficulty in writing, speaking or understanding the English language due to an environmental background wherein a language other than English is primarily or exclusively spoken. Programs and services provided for gifted pupils as provided in this subsection may not be separate from programs provided for other gifted pupils, and may not be provided in facilities separate from the facilities used for other gifted pupils. Identification of gifted pupils as provided in this subsection shall be based on tests or subtests that are demonstrated to be effective with special populations including those with a handicapping condition or difficulty with the English language.

E. The governing body of each school district, county or agency involved in intergovernmental agreements may:

1. In cooperation with another school district or districts, establish special education programs for exceptional children. When two or more governing bodies determine to carry out by joint agreement the duties in regard to the special education programs for exceptional children, the governing bodies shall, in accordance with state law and the rules of the division of special education, establish a written agreement for the provision of services. In such agreements, one governing body of each school district, agency involved in intergovernmental agreements or the county shall administer the program in accordance with the contract agreement between the school districts. Tuition students may be included in the agreement. The agreement may also include lease-purchase of facilities for the special education programs for exceptional children.

2. Establish work-experience programs in accordance with rules of the division of special education. The work-experience programs shall consist of classroom instruction, evaluation, training and part-time employment. The evaluation, training and part-time employment may take place on or off the school campus, in or out of the school district, but must be under supervision of certified school personnel. Students enrolled in the work-experience program shall be at least sixteen years of age. Time in a work-experience program shall be counted as attendance at school to qualify for appropriations provided by § 15-769. All work-experience programs must have the approval of the division of special education.

F. The county school superintendent may, upon approval of the division of special education, establish special education programs in the county accommodation schools under his jurisdiction or may cooperate with other school districts by agreement to provide such services for such special programs in accordance with the rules of the division of special education. At the beginning of each school year the county school superintendent shall present an estimate of the current year's

accommodation school exceptional programs tuition cost to each school district that has signed an agreement to use the services of the accommodation school. The tuition shall be the estimated per capita cost based on the number of pupils that each school district has estimated will enroll in the program, and the school district shall pay the tuition quarterly in advance on July 1, October 1, January 1 and April 1. Increases in enrollment during the school year over the school district's estimate of July 1 shall cause the tuition charges to be adjusted accordingly. In the event of overpayment by the school district of residence, the necessary adjustment shall be made at the close of the school year.

Amended by Laws 1986, Ch. 250, § 3; Laws 1989, Ch. 273, § 9, eff. June 26, 1989.

Notes of Decisions

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1. In general

Local school district could provide special education services to a student not enrolled in the district, but the student could not be counted in the district's average daily membership for purposes of state funding but could be counted for purposes of federal funding. Op.Atty.Gen. No. I84-085.

3.5 Private therapist

School district may hire on a fee basis a private speech therapist or pathologist to screen or evaluate students who have been referred as possibly speech-handicapped, but any such private therapist or pathologist must be certificated. Op.Atty.Gen. No. I86-069.

8. **Handicapped children**

Policy of Education of All Handicapped Children Act, 20 U.S.C.A. § 1401 et seq., to mainstream handicapped children to assure that they are educated with children who are not handicapped must be balanced with primary objective of providing handicapped children with appropriate education. Wilson v. Marana Unified School Dist. No. 6 of Pima County (C.A. 1984) 735 F.2d 1178.

§ 15-765. Special education provided in rehabilitation, corrective or other state and county supported institutions, facilities or homes

A. For the purposes of this section and § 15-764, handicapped children being furnished with special education in rehabilitation, corrective or other state and county supported institutions or facilities are the responsibility of that institution or facility, including handicapped children who are not enrolled in a residential program and who are being furnished with daily transportation. Special education programs at the institution or facility shall conform to the conditions and standards prescribed by the director of the division of special education.

B. Notwithstanding the provisions of subsection A of this section, the department of economic security may request on behalf of a school-age handicapped child residing in a residential facility operated or supported by the department of economic security or in a special foster home for mentally retarded persons as described in § 36-558.01 that the school district in which the facility or home is located enroll the school-age child in the district. The school district shall, upon the request by the department of economic security, enroll the handicapped child and provide special education and related supportive services to the child, subject to § 15-825 or chapter 10, article 7 of this title.[1] A school district in which a handicapped child is enrolled shall coordinate

the development of an individual education program plan with the department of economic security's development of an individual plan for the child if the child has applied for or is receiving programs and services for the developmentally disabled provided directly or indirectly by the department of economic security. The provision of special education and related supportive services to a handicapped child may be subject to the provisions of subsection C of this section.

C. A school district or county school superintendent may contract with, and make payments to, other public or private schools, institutions and agencies approved by the division of special education, within or without the school district or county, for the education of and provision of services to exceptional children if the provisions of § 15-766 and the conditions and standards prescribed by the division of special education have been met and if unable to provide satisfactory education and service through its own facilities and personnel in accordance with the rules and regulations prescribed by the division of special education. No school district may contract or make payments under the authority of this section or § 15-764 or any other provisions of law for the residential or educational costs of placement of handicapped children in an approved private special education school, institution or agency unless the children are evaluated and placed by a school district.

D. The school district shall notify the appropriate state agency and the department of education that placement of a child in a private residential program is necessary to provide special education. The education program in which placement is made shall be one which has been approved by the department of education for special education and shall be the least restrictive appropriate program available. The residential program in which placement is made shall be licensed by the department of economic security and shall be the least restrictive appropriate program available. The residential program may include twenty-four hour residential care,

group care or family care on a full-time or part-time basis. Following and in accordance with the consensus decision of the multidisciplinary team as prescribed in § 15-766, the residential placement shall be made by mutual agreement between the school district and the appropriate state agency. The department of education shall enter into interagency service agreements with the department of economic security and the department of health services which shall establish a mechanism for resolving disputes in the event the school district and either the department of economic security or the department of health services cannot mutually agree on the type of residential placement.

E. A school district shall pay the standard educational costs charged by a private or public school, institution or agency for regular day care pupils for each person placed in a residential program as provided in § 15-766. Payments by the school district are authorized only for the period of time the schools within the school district are normally in operation. All noneducational and nonmedical costs incurred by the placement of a person in a private or public school program and concurrent residential program or in a less restrictive placement are payable by the department of economic security for the trainable mentally handicapped, the autistic and the educable mentally handicapped and the department of health services for the seriously emotionally handicapped.

F. The department of economic security or the department of health services, whichever is appropriate, shall determine if the person placed for purposes of special education in a private or public school and concurrent residential program is covered by an insurance policy which provides for inpatient or outpatient child or adolescent psychiatric treatment. The appropriate state agency may only pay charges for residential placement for purposes of special education that are not covered by an insurance policy. Notwithstanding any other law, the appropriate state agency may pay for

placement of the person before the verification of applicable insurance coverage. On the depletion of insurance benefits, the appropriate state agency shall resume payment for all noneducational and nonmedical costs incurred in the treatment of the person. The appropriate state agency may request the person's family to contribute a voluntary amount toward the noneducational and nonmedical costs incurred as a result of placement of the person in a twenty-four hour care facility. The amount which the appropriate state agency requests the person's family to contribute shall be based on guidelines in the rules and regulations of the department of economic security, division of developmental disabilities governing the determination of contributions by parents and estates.

G. If services are offered by the school district and the parent or the student chooses for the student to attend a private facility, either for day care or for twenty-four hour care, neither the school district nor the respective agency is obligated to assume the cost of the private facility. If residential twenty-four hour care is necessitated by factors such as the student's home condition and is not related to the handicap of the student, the agency responsible for the care of the child is not required to pay any additional costs of room and board and nonmedical expenses.

H. A governing board or county school superintendent may contract with a private special education program for the provision of services to seriously emotionally handicapped pupils if the provisions of § 15-766 are met and if unable to provide satisfactory education and service through its own facilities and personnel. For placement of seriously emotionally handicapped pupils in a private special education program the chief administrative official of the school district or county or other person as designated by the school district or county as responsible for special education shall verify that the pupil is diagnosed as seriously emotionally handicapped pursuant to § 15-761, that no appropriate program exists

within the school district or county, as applicable, and that no program can feasibly be instituted by the school district or county, as applicable.

I. A governing board or county school superintendent may establish a special program which provides intensive services to seriously emotionally handicapped pupils who cannot be appropriately served in traditional resource or self-contained special education classes. Such services may be provided in separate facilities with specialized personnel to meet the unique needs of severely handicapped pupils. The chief administrative official of the school district or county or other person as designated by the school district or county as responsible for special education shall verify that a pupil placed in such a program is diagnosed as seriously emotionally handicapped as prescribed in § 15-761 and that appropriate services cannot be provided in traditional resource and self-contained special education classes.

Amended by laws 1985, Ch. 166, § 9, eff. April 18, 1985; Laws 1988, Ch. 127, § 1.

[1]Section 15-1201 et seq.

Historical Note

1988 Reviser's Note:

Pursuant to authority of § 41-1304.02, in subsection C the spelling of the first "education", "exceptional" and the first "prescribed" was corrected and in subsection D the spelling of "multi-disciplinary" and "mutually" was corrected

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Notes of Decisions

Private facility 2

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2. Private facility

Local school district under A.R.S. §§ 15-765(E) and 15-766 must provide 24-hour residential placement in private facility to handicapped student when such placement is necessary for student to receive education and local school district is required to pay educational costs associated with the placement, noneducational and nonmedical costs are payable by Department of Economic Security for trainable mentally handicapped and educable mentally handicapped and by Department of Health Services for seriously emotionally handicapped. Op. Atty.Gen. No. I86-010.

§ 15-766. Evaluation of child for placement in special education program

A. The referral of a child for evaluation for possible placement in a special education program shall be made under the direction of the chief administrative official of the school district or county, or such person designated by him as responsible for special education, after consultation with the parent or guardian.

B. Before a child is placed in a special education program an evaluation shall be made of the capabilities and limitations of the child. The evaluation shall be made by at least one professional specialist in a field relevant to the child's handicap and under the direction of the chief administrative official of the school district or county or such person designated by him as responsible for special education. If appropriate, the educational implications of the handicapping conditions shall be evaluated by a psychologist. The school district or county may conduct jointly, directly or indirectly with the department of economic security the special education evaluation of a handicapped pupil enrolled in the

school district or county who has applied for or is receiving mental retardation programs or services from the department of economic security, or may contract with the department of economic security to provide a placement evaluation for the department of economic security or to have the department of economic security provide the special education evaluation for the school district or county. The evaluation pursuant to this section shall contain in writing, but is not limited to:

1. Reason for referral.
2. Educationally relevant medical findings.
3. Educational history of the child including complete documentation of efforts to educate the child in the regular classroom.
4. Determination whether the child's educational problems are related to or resulting from reasons of educational disadvantage.
5. Developmental history of the child.
6. Types of tests administered to the child and results of such tests.
7. Recommendation of specific goals and instructional objectives based upon current levels of performance needs.

C. The results of the evaluation shall be submitted in writing and with recommendations to the chief administrative official of the school district or county or to such person designated by him as responsible for special education.

D. In determining placement the following persons shall be consulted by the chief administrative official of the school district or county or such person designated by him as responsible for special education:

1. The school principal.
2. A person responsible for administering or conducting special education courses in the school or school district and a special education teacher who may provide the special services designed for the child.
3. A teacher who currently has been instructing the child.

4. A professional person qualified in the area of the child's suspected handicap.
5. A parent or guardian of the child and, whenever appropriate, such child.
6. If residential placement is a possibility, a representative of the state agency responsible for noneducational costs of the residential program.
7. Other individuals at the discretion of the parent or school district or county.

E. The chief administrative official of the school district or county or such person designated by him as responsible for special education shall place the child, based upon the consensus reached in the multidisciplinary conference and subject to due process pursuant to 20 United States Code § 1415,[1] except that no child shall be placed or retained in a special education program without the approval of his parent or guardian.

F. The state board of education shall adopt rules governing the evaluation of a child and classification of the child as autistic pursuant to this section.

Amended by Laws 1986, Ch. 298, § 2, eff. May 6, 1986; Laws 1988, Ch. 127, § 2.

[1]20 U.S.C.A. § 1415.

Historical Note

1988 Reviser's Note:

Pursuant to the authority of § 41-1304.02, in subsection D, paragraph 4 the spelling of "qualified" was corrected and in subsection E the spelling of "Multidisciplinary" was corrected.

Cross References

Preschool programs for handicapped children, see § 15-771.

Notes of Decisions

Private facility 6
Private therapist 5

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3. Individual educational program

In case of child who is developmentally disabled as defined by § 36-551, Department of Economic Security and local district must coordinate in development of the child's individualized education program if residential placement is recommended by the district, and the district must ensure that representative of private school facility or facilities being considered attend or participate in developing the program. Op.Atty.Gen. No. I85-014.

Education placement decisions relating to handicapped children must initially be made by the local school district in which the child resides and preliminary placement decision must be reviewed by school district individualized education program team if child's parents request review. Op.Atty.Gen. No. I85-014.

5. Private therapist

School district may hire on a fee basis a private speech therapist or pathologist to screen or evaluate who have been referred as possibly speech-handicapped, but any such private therapist or pathologist must be certified. Op.Atty.Gen. No I86-069.

6. Private facility

Local school district under A.R.S. §§ 15-765(E) and 15-766 must provide 24-hour residential placement in private facility to handicapped student when such placement is necessary for student to receive education and local school district is required to pay educational costs associated with the placement; noneducational and nonmedical costs are payable by Department of Economic

Security for trainable mentally handicapped and educable mentally handicapped and by Department of Health Services for seriously emotionally handicapped. Op.Atty.Gen. No. I86-010.

§ 15-767. Review of special education placement; report of educational progress

The placement of a child in a special education program shall be reviewed by the chief administrative official of the school district or county or such person as designated by him as responsible for special education at least once each year, and a copy of the results of the review shall be submitted to the parent or guardian of the child. The educational progress of a child in a special education program shall be reviewed and reported to the parent or the guardian of the child at least once each semester.

Added by Laws 1981, Ch. 1, § 2, eff. Jan. 23, 1981. Amended by Laws 1981, Ch. 31, § 1.

Cross References

Preschool programs for handicapped children, see § 15-771.

Notes of Decisions

1. In general

Education placement decisions relating to handicapped children must initially be made by the local school district in which the child resides and preliminary placement decision must be reviewed by school district individualized education program team if child's parents request review. Op.Atty.Gen. No. I85-014.

§ 15-768. Reports to department of education and department of economic security

A. Each governing board shall report annually on or before February 1 to the department of education by handicapping category the number and ages of those handicapped pupils as defined in § 15-761, paragraphs 1, 8, 9 and 16 who are scheduled to graduate or to otherwise terminate their special education programs at or prior to the end of the school year.

B. The department of education shall compile and forward such information to the department of economic security by March 7 of each year.

Amended by Laws 1986, Ch. 298, § 3, eff. May 6, 1986; Laws 1987, Ch. 363, § 2, eff. May 22, 1987; Laws 1989, Ch. 15, § 3.

§ 15-769. Appropriation and apportionment; approval of program

A. Except as provided in this section and § 15-770, all students as defined by § 15-761 shall be included in the entitlement to state aid computed as provided in chapter 9, article 5 of this title[1] and apportionment made as provided in § 15-973.

B. A district may budget using the group B weight for a homebound handicapped pupil if the educational program meets the minimum standards established by the State board of education. For purposes of computing the base support level, a school district shall not classify a pupil in more than one category of special education.

C. The appropriations and apportionment as provided in chapter 9, article 5 of this title shall not be granted to the governing board of a school district or county school superintendent unless the school district or county complies with the provisions of this article and the conditions and standards prescribed by the superintendent of public instruction pursuant to rules of the state board of education for pupil identification and placement pursuant to §§ 15-766 and 15-767.

D. If a pupil does not receive special education instructional services but receives at least one ancillary service, the pupil shall be considered a special education student for the group B funding. If the handicapping category has both a resource and self-contained weight, the pupil shall be classified as in a resource program. In this subsection, "ancillary service" means one of the following:

1. Physical therapy.
2. Occupational therapy.
3. Orientation and mobility training.
4. Sign language interpretation services.
5. A full-time aide needed for an individual pupil to benefit from the pupil's instructional program as specified in the pupil's individualized education program.

Amended by Laws 1985, Ch. 127, § 2; Laws 1989, Ch. 15, § 4.

[1]Section 15-971 et seq.

Historical Note

The 1989 amendment deleted "and regulations" following "pursuant to the rules" in subsec. C; added subsec. D; and rewrote subsec. B which read:

"A school district shall compute the base support level as provided in § 15-943 with reference to the student count for group B students who attended classes and programs having a minimum of two hundred forty minutes of instruction or work experience as provided in § 15-764, subsection E per school day or having a minimum of one thousand two hundred minutes a week, except that a child receiving instruction under the home-bound teaching program is deemed in the school enrollment if he attends classes or receives instruction for a period of not less than four hours per week. For purposes of computing the base support level, a school district shall not classify a pupil in more than one category of special education."

APPENDIX G

CATALINA FOOTHILLS SCHOOL DISTRICT
SPEECH/LANGUAGE/HEARING

NAME Jim Zobrest DATE September 21, 1988
DATE OF BIRTH 3-2-74 SCHOOL Slapointe High School

EVALUATOR Mary K. Hodgson
Catalina Foothills School District

Jim is a ninth grade, profoundly deaf student who had received all of his education prior to sixth grade in a school for the deaf. He attended grades six through eight in the Catalina Foothills School District and is presently enrolled as a freshman at Salpointe High School. Catalina Foothills Schools provided him a mainstream program where he received resource room assistance for academics, speech/language therapy, and an interpreter who accompanied Jim to all classes. Jim's primary language is sign language which he used almost exclusively in classrooms. By mutual agreement he used little or no sign in speech class. All speech work and evaluation were done orally using total communication – oral speech, sign, gesture, and writing. Receptively he depends upon lip reading and the use of residual hearing.

Jim wears binaural hearing aids and has just been fitted with new aids. (audigram to follow) Vision problems were discovered during a school screening in school year 86-87. He was examined by a physician and fitted with glasses. Later he was fitted with contact lenses.

Educational Evaluation: Year end grades – See attached
ITBS scores. – See attached

Speech Evaluation:

Jim's ability to lip read was measured using a 100 Word Vocabulary List which represents consonant sounds in all positions of a word. Lip reading the word

list alone, out of context, Jim was able to repeat 52%. Lip reading the word in context raised his score to 89%. Words most difficult to lip read are those with poor visability /d/, /t/, /k/, /g/ he substitutes an /h/ for these in all positions in a word.

Production was measured using the Goldman Fristoe Articulation Test pictures. (clinically because of absence of norms for the deaf) Once again, Jim was able to produce intelligibly all consonant and vowel sounds with the exception of /d/, /t/, /k/, /g/, / /, / /, and / /. Conversational speech is 40% intelligble when content is known and 59% for unknown content.

Total language scores on the ITB6, administered in April of 1988 – 81%, 7 stanine. Vocabulary at 26% and 4th stanine was his lowest language score – all others were at or above the 50th percentile.

Year end grades, all of which represent work in a standard classroom except math which was a remedial class, are all A's and B's.

Jim was phased out of special resource room help in February of 1988.

SHORT TERM GOALS: Attached

LONG TERM GOALS:

XX 1. The student's speech skills will be developed to a level appropriate for his/her age.
XX 2. The student's Receptive/Expressive language skills will be developed to a level appropriate for his/her age.
X 3. The student's articulation will be developed to a level appropriate for his age.

RELATED SERVICES:

Transportation: The district will reimburse for transportation expenses in accordance with and subject to conditions (with the exception that the meeting place will be Canyon View School instead of Orange Grove

Junior High School) set forth in the letter dated 9-8-88 between Tom Berning and Denise M. Bainton, a copy of which has been given to the parents.

All parties agree that Jim Zobrest needs the services of a sign language interpreter. The issue of whether the district is required by state or federal law to pay for such services while Jim Zobrest is a student at Salpointe Catholic High School is currently the subject of litigation in Federal District Court.

As a result of this consultation, and with full awareness of my parents rights, I ____ approve, I ____ disapprove:

___ Continuation of program ____ Termination of program

XX Transfer from school based to itinerant level of program.

SZ Parental rights, Confidentiality Statement and prior IEP reviewed (parent, please initial).

The preceeding has been explained to me in my primary language. I reserve the right to reconsider this decision at a later date.

/s/ Sandra Zobrest — Oct. 5, 1988

Signature of Parent or Guardian — date

PS: Color White: Sp. Ed. Office
Yellow: Resource

1/87.

CATALINA FOOTHILLS SCHOOL DISTRICT

2101 East River Road, Tucson, Arizona 85718

STUDENT: Jim Zobrest
SCHOOL: Salpointe High School
RESOURCE TEACHER: Hodgson
DATE:
CATEGORY: Speech/Language

OBJECTIVES

TM – Totally Met PM – Partially Met NM – Not Met

All goals will be considered met at 80% accuracy over six (6) consecutive meetings.

1. Student's conversational speech intelligibility will be increased from 40% to 60% when content is unknown.
2. Student's conversational speech intelligibility will be increased from 69% to 90% when content is known.
3. Student will produce a /t/ sound in single word drill (See 87-88 IIP)
4. Student will produce a correct /d/ in single word drill (see 87-88 IIP)
5. Student will produce a correct /k/ in isolation. (see 87-88 IIP)
6. Student will produce a correct /g/ in isolation.
7. Student will increase his lip reading percentage for single words from 52% to 90%.
8. Student will reduce mean number of re-statements – academic and socially from 9 to 5.
9. Student will learn five new content area vocabulary words a week.
10. Student will improve his overall communication skills – using speech, sign, gesture and writing – from 64% to 80%.

CATALINA FOOTHILLS SCHOOL DISTRICT
NAME Jim Zobrest
DATE OF BIRTH 3-2-74
EVALUATOR Mary Hodgson
Catalina Foothills School District

SPEECH/LANGUAGE/HEARING EVALUATION
DATE September 21, 1988
SCHOOL Salpointe High School

1. CONVERSATIONAL SPEECH:

Conversational speech intelligibility when context is unknown – 40%

Conversational speech intelligibility when context is known – 69%

2. CHARTED CONVERSATIONS:

Chartered conversations from 9-20-87 through 6-3-88 counting number of re-statements which culminate in a written message. Mean number of written re-statements was 9 with a range of 3 to 21.

3. CHARTED ACADEMIC SPEECH:

Speech from 9-20-87 to 6-3-88 Observing Jim in various academic settings and charting interaction possibilities against actual number, suggest a student who communicates successfully 64% of the time.

4. LIP READING:

100 word list representing all sounds in English – lip reading alone – 52%

100 word list (same list) in context – 89%

5. ARTICULATION:

Articulation was evaluated using pictures from Goldman Fristoe Articulation Test.

Missing Sounds

Initial	Medial	Final
/g/ h/g	h/g	omit
/k/ h/k	h/k	h/k
/D/ (ing)	h/D (ing)	c/D
/t/ h/t		a/
/s/(sh) s/s	s/s	omit
/ts/(ch) h/t	t/ts	omit
/d/3(j) h/d3	h/d3	omit

6. GENERAL LANGUAGE:

Language Sample – Jim's oral language is very advanced. All 21 content categories are present. Form is somewhat delayed due to limited vocabulary and sound distortions. However, grammar and syntax are appropriate – correct pronoun usage and noun/verb agreement are consistent. Use is also advanced in that he knows when to use various forms – however, some social aspects or oral language require additional work, i.e., talk with his interpreter while teacher is lecturing, demanding attention from another student during group activities. He has developed the excellent classroom behavior of stopping the teacher when he does not understand, asking pertinent questions, contributing to the discussion, answering questions. Oral interactions (without the interpreter) have increased markedly over the three years Jim has been in Catalina Foothills School District. He uses Total Communication – a combination speech, sign, gesture and writing. He enters conversations, maintains/changes topics, adds information and asks questions – both academically and socially.

Sentence length is appropriate and complicated grammatic forms are consistently used.

During the past year his interpreter insisted that Jim sign/speak at all times. This has resulted in considerable improvement in intelligently since it forces him to speak more slowly and to finger spell/speak words that are difficult to understand.

Many teachers and students deal directly with Jim and bypass the interpreter using the various Total communication skills.

APPENDIX H

Zobrest, et al.,	)	
	)	
Plaintiffs,	)	
	)	NO. CIV. 88-516
vs.	)	TUC-RMB
	)	
Catalina Foothills School District,	)	
	)	
	)	
Defendant.	)	

AFFIDAVIT

STATE OF ARIZONA)
)
COUNTY OF MARICOPA)

I, LINDA S. PAVOL, being first duly sworn upon my oath, depose and say:

That I am legal counsel for the Arizona Department of Education and have personal knowledge of the facts set forth in this affidavit, and am a licensed member of the State Bar of Arizona.

A.A.C. R7-2-405 provides that the final administrative appeal of a special education due process hearing decision shall be conducted by the Division of Special Education, Arizona Department of Education.

On June 27, 1988, the Arizona Attorney General issued an opinion on the precise issues of this lawsuit, and concluded that it is constitutionally impermissible for a public school to provide the services of an interpreter for a deaf student who chooses to attend a parochial school (Ariz. Atty. Gen. Op. I88-072, copy attached). In view of this unusual circumstance, it appears futile for the parties to pursue administrative remedies.

DATED this 29th day of December, 1988.

/s/ LINDA S. PAVOL
LINDA S. PAVOL
Assistant Attorney General
State of Arizona

SUBSCRIBED AND SWORN to before me this 29th day of December, 1988.

/s/ ELIZABETH BONER
NOTARY PUBLIC

My Commission Expires:
April 17, 1989
3433A.73

Attorney General
1275 West Washington
Phoenix, Arizona 85007
Robert L. Corbin

June 27, 1988

The Honorable Stephen D. Neely
Pima County Attorney
Civil Division
32 N. Stone, Suite 1500
Tucson, Arizona 85701-1412

Re: I88-072 (R88-059)

Dear Mr. Neely:

Pursuant to A.R.S. § 15-253(B) we have reviewed your April 26, 1988 opinion to the Assistant Superintendent of Catalina Foothills School District and concur with your conclusion that a public school district's provision of an interpreter for a deaf student, who chooses to attend a parochial school, violates the First Amendment of the Federal constitution and art. II, § 12 of the Arizona Constitution.

Sincerely,

/s/ Bob Corbin
BOB CORBIN
Attorney General

BC:LSP;pnw

APPENDIX I

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LARRY ZOBREST; SANDRA ZOBREST, husband and wife; JAMES ZOBREST, a minor, by LARRY and SANDRA ZOBREST, his parents, *Plaintiffs-Appellants,* *v.* CATALINA FOOTHILLS SCHOOL DISTRICT, *Defendant-Appellee.*	No. 89-16035 D.C. # CV-88-0516-RMB ORDER

BEFORE: TANG, FLETCHER, and REINHARDT, Circuit Judges.

The mandate is stayed until the Supreme Court issues its opinion in *Lee v. Weisman,* No. 90-1014 and until further order of this court.